82-2156

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No.

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT HENDERSON,
Superintendent, Auburn Correctional Facility,

Petitioner,

against

NORMAN SILVERSTEIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the Due Process Clause of the Fourteenth Amendment permits a defendant represented by an attorney, who has been examined and found to be competent by a physician and the court and whose conduct and demeanor reflect a reasoned understanding of the nature of the proceeding and a rational ability to assist in his defense, to waive a possible challenge to his competency and plead guilty without the benefit of a court ordered competency hearing?

2. Whether the conflict between the Second Circuit's rigid application below of this Court's decision in *Pate* v. *Robinson*, 383 U.S. 375 (1969) and the flexible standards followed by the Sixth and Ninth Circuits with respect to the need for the trial court to conduct a competency hearing should now be resolved by this Court?

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Preliminary Statement

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT.

Petitioner Robert Henderson seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which reversed an order and judgment denying respondent's petition for a federal writ of habeas corpus and directed the issuance of the writ unless

the respondent ("Silverstein") is brought to trial within a reasonable period.

Respondent's petition for a writ of habeas corpus in the United States District Court for the Southern District of New York set forth the following claims:

(1) the failure to hold a competency hearing and the subsequent acceptance of his guilty plea to robbery in the first degree when he was allegedly incompetent deprived him of due process;

(2) improper allocution by the plea judge;

(3) ineffective assistance of trial and appellate counsel;

(4) unknowing waiver of constitutional rights by virtue of the guilty plea; and,

(5) improper sentence based on erroneous misrepresentations in the pre-sentence report.

The gravamen of the petition relied on this Court's decision in *Pate* v. *Robinson*, 383 U.S. 375 (1966), which held that the failure to hold a competency hearing despite evidence which raises a "bona fide doubt" as to a defendant's competence to stand trial, deprived the defendant of his constitutional right to a fair trial.

The Second Circuit, citing this Court's opinion in *Pate*, *supra*, ruled that Silverstein, who was found competent to proceed based on the most recent of two psychiatric reports, who failed to raise the issue of competency on appeal, and whose attorney moved to confirm the finding of competency without objection from Silverstein during the plea proceedings, had not and constitutionally could not waive a chal-

lenge to his competency. Moreover, the Court of Appeals held that the trial court's failure to order a hearing, *sua sponte* if necessary, in light of the conflicting psychiatric reports and respondent's prior mental history violated the respondent's right to a fair trial under *Pate* v. *Robinson*, *supra*.

Opinions Below

The opinion of the Court of Appeals is set forth in Appendix A, *infra*. The opinion of the United States District Court for the Southern District of New York is set forth in Appendix B, *infra*. The transcript of the plea proceeding in the state court is set forth in Appendix C, *infra*. The transcript of the proceeding held relative to respondent's second motion to vacate the judgment of conviction is set forth in Appendix D, *infra*. The transcript of the sentencing minutes is set forth in Appendix E, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 12, 1983.

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, § 1254(1).

Constitutional Provisions Involved

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> Nor shall any State deprive any person of life, liberty or property, without due process of law. . . .

Statement of the Case

A. State Proceedings

1. The Indictments

On April 20, 1976, the Bronx County Grand Jury charged respondent and a co-defendant* with the crimes of Robbery in the First Degree (4 counts) and Criminal Possession of a Weapon in the Fourth Degree (3 counts). Indictment No. 994/76. On April 5, 1977, as a result of a separate incident, respondent was charged by the Bronx County Grand Jury with the crimes of Forgery in the Second Degree; Grand Larceny in the Second Degree; Criminal Possession of Stolen Property in the Second Degree (2 counts); Reckless Endangerment in the First Degree; Assault in the Second Degree; Unlawful Use of a Credit Card; Theft of Services and Resisting Arrest (2 counts). Indictment No. 475/77.

2. Trial Court Proceedings

(a) The Two Psychiatric Reports

On March 22, 1977, the judge presiding over the first indictment ordered respondent to be examined pursuant to Article 730 of the New York State Criminal Procedure Law (C.P.L.) in order to determine his competency to stand trial. The two court appointed psychiatrists examined respondent on April 6, 1977 and both agreed he was incompetent to stand trial. On April 12, 1977 the presiding judge granted defense counsel's motion to confirm the psychiatric report

* Respondent's co-defendant, Gus Zeising, pleaded guilty to Robbery in the First Degree and on December 16, 1976, was sentenced to an indeterminate term of imprisonment not to exceed seven years.

and ordered respondent detained at Bellevue Hospital, pending transfer by the State Department of Mental Hygiene.

Respondent was examined on April 19, 1977, at the Mid-Hudson Psychiatric Center by a third psychiatrist and found competent to proceed. He returned to the trial court on May 20, 1977 and pursuant to defense counsel's express request, the psychiatric report of the third psychiatrist was confirmed and petitioner was found fit to proceed.

(b) The Plea and Sentence

Following the confirmation of the psychiatric finding of competency, respondent, per an agreement with the Bronx County district attorney, offered to withdraw his previously entered plea of not guilty and pled guilty to one count of robbery in the first degree in satisfaction of all remaining charges in the first and second indictment, as well as all other outstanding charges, including violation of probation and/or parole and any bail jumps.

During an extensive colloquy with the trial court, respondent admitted that he forcibly stole money from one Bruno Spadafora, and in the course of the commission of the crime he had in his possession what appeared to be a pistol. He acknowledged that he had spoken to his attorney before entering the plea (P. 4-5).* Further, he understood that a plea of guilty operated as a waiver of his right to a trial by jury, to call witnesses in his behalf, and to cross-examine witnesses who may testify against him (P. 5-6). He conferred with his attorney throughout the plea

* Numerical references preceded by "P" refer to the plea minutes filed herewith in petitioner's Appendix.

proceedings and corrected the judge on certain immaterial facts while denying other facts relevant to a separate forgery charge covered by the plea (P. 5-6). Silverstein further admitted that he was entering the guilty plea voluntarily because he was "in fact guilty and for no other reason" (P. 6).

On June 21, 1977, respondent was sentenced pursuant to the plea agreement to an indeterminate sentence with a maximum of eighteen years and a minimum of nine years. He thus avoided exposure as a predicate felon to a sentencing range of 12½ to 25 years (Penal Law § 70.00(2)(b), 70.10(2)).

3. State Appeals

In his direct appeal to the Appellate Division, First Department, the only ground for relief set forth by respondent was the alleged excessiveness of his bargained for sentence "for a robbery committed by a manipulated, retarded, illiterate person" (Respondent's Appellate Division brief, page 6). Respondent's alleged incompetence was not urged as a ground for reversing the conviction on appeal. Nonetheless, the brief contained frequent references to the presentence report which clearly indicated "the defendant was declared incompetent to stand trial, and committed to Mid-Hudson State Hospital on April 12, 1977" (Respondent's brief, pp. 4, 5, 7).* The Appellate Division

* Mysteriously, the Second Circuit Court of Appeals speculated that respondent failed to urge his incompetency on direct appeal due to his counsel's ignorance of the April 12, 1977 Mid-Hudson Psychiatric Report which found Silverstein incompetent to proceed. The record flatly refutes this conclusion and further highlights respondent's waiver. *Silverstein* v. *Henderson*, 82-2028, at 3105, 3106, n.3, n.5. Moreover, frequent reference to the conflicting reports appears in the sentencing minutes filed herewith.

affirmed without opinion, 65 A.D.2d 679 (1978), and leave to appeal to the Court of Appeals was denied on November 28, 1978.

4. Post-Trial Motions to Vacate Judgment

(a) September 11, 1980 Motion to Vacate

Two years later, on September 11, 1980 respondent filed a *pro se* motion pursuant to C.P.L. § 440.10 (McKinney 1971) to vacate his conviction, raising as grounds:

(1) alleged ineffectiveness of trial counsel in failing to conduct a *Wade* and *Huntley* hearing and to contest the finding of the psychiatric report which found him competent;

(2) improper allocution; and

(3) unknowing waiver of the constitutional rights he would be waiving by pleading guilty.

The People cited respondent's unjustifiable failure to raise these issues on his direct appeal and argued that the court was procedurally barred from considering same pursuant to C.P.L. § 440.10 2(c). The presiding judge, who had observed respondent's demeanor throughout the prior proceedings, denied the motion in all respects without a hearing on the ground that "the issues presented by defendant have already been determined by the Appellate Division." Respondent's application for leave to appeal this decision was denied by the Appellate Division on December 11, 1980.

(b) December 24, 1980 Motion to Vacate

Respondent, acting *pro se*, filed his second § 440.10 petition on December 29, 1980, reiterating his claim of inef-

fective assistance of counsel at trial and appeal, as well as the issue of his alleged incompetence during the plea proceeding. The court likewise denied this motion in all respects on the ground that respondent was procedurally barred from raising these claims owing to his failure to set forth these contentions in his direct appeal or prior § 440.10 motion, noting:

> "There must be a time where litigation must cease. And this defendant has been given every opportunity to have these issues brought before the Appellate Division. There is nothing new or novel that hasn't been brought to the attention of either this Court or the Appellate Division . . .
>
> I'm deciding this on the fact that it's been previously determined. And I'm terminating litigation on this matter. It's not being decided on the merits, its being decided because there's been a prior adjudication."

Silverstein's application for leave to appeal was denied by the Appellate Division on March 12, 1981.

B. Federal Proceedings

On January 8, 1981, respondent filed a *pro se* petition for a writ of habeas corpus in the District Court for the Southern District of New York. He subsequently retained counsel, who filed supporting papers. Respondent claimed five grounds for relief:

(1) incompetency during the plea proceedings below and abuse of discretion in failing to grant a competency hearing;

(2) improper allocution on his plea;

(3) ineffective assistance of trial and appellate counsel;

(4) unknowing waiver of constitutional rights in pleading guilty; and

5) use of an erroneous presentence report in the setting of his jail term.

Although the District Court correctly concluded the petition contained both exhausted (claims #1-4) and unexhausted claims (claim #5), the pre-*Rose* v. *Lundy*, 102 S. Ct. 1198 (1982) court proceeded to consider the mixed petition.

By opinion and order dated December 20, 1981, the district court (Stewart, J.) concluded Silverstein's claims regarding his alleged incompetency, improper allocution, unknowing waiver of constitutional rights and ineffective assistance of trial counsel due to his failure to contest respondent's competency, were barred by respondent's state procedural default. The claim with respect to ineffective assistance of counsel relative to the failure to request a *Wade* or *Huntley* hearing was considered on the merits and rejected.

On appeal, the United States Court of Appeals for the Second Circuit reversed the district court and directed the issuance of the writ for the reasons stated above. The mandate of the Court of Appeals has been stayed pending resolution of the instant petition for a writ of certiorari.

Reasons for Granting the Writ

The apparent conflict in principle by the federal courts of appeals in determining whether and under what circumstances a defendant may waive the right to challenge competency and/or insanity and whether such a waiver operates as a procedural default requires the guidance of this Court in resolving these important constitutional questions in order to provide future assistance to state and federal courts in the proper administration of guilty pleas and the criminal justice system.

Since this Court's decision in *Pate* v. *Robinson*, 383 U.S. 375 (1966), the federal courts of appeals have sought to prescribe the general standard for determining whether a "substantial doubt" exists as to a defendant's capacity to stand trial sufficient to trigger the Court's obligation to *sua sponte* order an evidentiary hearing to resolve *bona fide* competency issues. *See DeKaplany* v. *Enomoto*, 540 F.2d 975 (9th Cir. 1976), *cert. den.* 429 U.S. 1075; *Williams* v. *Bordenkircher*, 696 F.2d 464, 466 (6th Cir. 1983); *United States* v. *Wright*, 627 F.2d 1300 (D.C. Cir. 1980); *United States* v. *Caplan*, 633 F.2d 534 (9th Cir. 1980).

Indeed, this Court has often referred to "the absence of fixed or immutable signs which may invariably indicate the need for a further inquiry to determine fitness to proceed." *Drope* v. *United States*, 420 U.S. 162 (1975). Further compounding this lack of a precise standard as to what constitutes "sufficient doubt" regarding competency under *Pate*, *supra*, is the defendant's right, as an integral part of defense strategy, to waive possible defenses and opt to plead guilty.

The instant Second Circuit Opinion effectively vitiates a defendant's right to constitutionally waive possible defenses if he or she is able to make a reasoned choice among the alternatives presented and able to understand the nature and consequences of the waiver. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Chavez* v. *United States*, 641 F.2d 1253, 1259 (9th Cir. 1981). *United States* v. *Wright*, 627 F.2d 1300 (D.C. Cir. 1980).

In light of the instant decision, the important and recurring constitutional question squarely facing this Court in an era of increased disposition of criminal cases by guilty pleas and the announced policy of this Court to accord finality to such pleas—is whether the rule of *Pate*, *supra*, should be so rigidly applied as to preclude a defendant from waiving a possible challenge to his competency and opt for a favorable plea agreement. The important subsidiary constitutional question is whether such a waiver operates as a procedural bar to subsequent challenges to the competency finding. The resolution of these crucial constitutional issues will provide much needed guidance to federal and state courts confronted with such constitutional "heads-I-win, tails-you-lose" gambles by defendants with a prior mental history and/or conflicting psychiatric reports who unilaterally may evade what would otherwise be the consequences of a guilty plea.

The Second Circuit's mechanistic application of the *Pate* rule in the instant case is certain to have the continuing future consequence of, *inter alia*, impugning the integrity and finality of guilty pleas. This is so because the decision rests on a formalistic application of the *Pate* rule. Such a rigid analysis, particularly when applied to this set of

facts, usurps the case by case review traditionally required in competency cases and replaces it with a mechanical response to the existence of any prior mental history and conflicting psychiatric reports. *Williams* v. *Bordenkircher*, 696 F.2d 464 (6th Cir. 1983). Thus, a defendant with a prior mental history who has been found fit to proceed by the most recent psychiatric report, who effectively consults with his attorney throughout the proceedings and lucidly discusses his culpability in the crime charged and the consequences of a guilty plea, may not elect to forego a possible incompetency defense and garner the benefits of a favorable plea bargain without being subjected to an unwanted hearing which fetters that reasoned choice.

Thus, notwithstanding the defendant's confirmation of the competency report, the absence of any expressed doubt by counsel concerning his client's competency, the court's evaluation of the defendant's demeanor, and the utter failure of the defendant to raise the issue on direct appeal, the instant decision concludes "no New York court could constitutionally find Silverstein had waived his right to challenge his conviction on the ground he was incompetent to stand trial". *Silverstein* v. *Henderson*, slip opinion, 82-2028 at 3116. Such a result is not required under the due process clause or the flexible guidelines established by this Court in *Pate* v. *Robinson*, 383 U.S. 375, 384 (1966). Moreover, such a rule conflicts in principle with federal court of appeals decisions in, *inter alia*, the Ninth and Sixth Circuit Courts of Appeals.

The Ninth Circuit has wisely refrained from a wooden application of the *Pate* rule. In *United States* v. *Caplan*,

633 F.2d 534 (9th Cir. 1980), the petitioner argued that a prior judicial determination of incompetency and a finding of incompetency by two psychiatrists is sufficient as a matter of law to raise a doubt as to present competence and to require automatically that an evidentiary hearing be held. *Id.* at 539. That argument was flatly rejected by the court, which held that "mechanical application" of the *Pate* analysis could lead to exclusion of highly probative evidence of present competency or incompetency, including the court's observation of the defendant and defense counsel's representation that he is able to communicate with the defendant and obtain cooperation in the defense. *Caplan* at 540.

Moreover, the *Caplan* court concluded the defendant had clearly waived an insanity defense by failing to pursue a determination of his sanity and by failing to comply with a procedural rule requiring written notice to the government of a defendant's intention to rely on an insanity defense. Rule 12.2 Fed. R. Crim. P.* Thus, the failure of the trial court to order an examination of defendant's sanity at the time of the commission of the offense could not be argued as a ground for reversal of defendant's conviction. *Id.* at 539.

In *DeKaplany* v. *Enomoto*, 540 F.2d 975 (9th Cir. 1976), *cert. den.* 429 U.S. 1075, the Ninth Circuit affirmed the denial of a habeas corpus petition where (1) petitioner was charged with murder by torture-pouring nitric acid over his wife, (2) a defense of insanity was interposed, (3) three psychiatric reports failed to make findings as to petitioner's competency, (4) petitioner's attorney believed petitioner was competent to stand trial, (5) petitioner was required to

* New York's comparable statute is found in New York Criminal Procedure Law § 250.10 *et seq.*

be forcibly restrained in court on the day he changed his plea to guilty, (6) his courtroom demeanor was otherwise beyond reproach, and (7) a guilty plea was apparently made voluntarily and understandingly. Accordingly, the failure to hold a competency hearing was held not to be violative of due process.

In *United States* v. *Clark*, 617 F.2d 180 (9th Cir. 1980) the Ninth Circuit once again recognized the flexibility of the *Pate* rule and the importance of defense counsel's representations regarding the defendant's competency. There, the defendant, who had previously been committed to a medical facility as incompetent, was not automatically entitled to a further competency hearing upon being certified by the medical staff as mentally competent and the fact that defendant's attorney apparently considered the defendant competent to stand trial was significant evidence that defendant was in fact competent.

With respect to the question of waiver, in an analogous context the Ninth Circuit has held that the failure to comply with a procedural rule regarding notice to the government of intent to use an insanity defense operates as a waiver of such a defense.

The Second Circuit's position conflicts in principle with not only the Ninth Circuit but also opinions in the Sixth Circuit and the D.C. Circuit. *Owens* v. *Sowder*, 661 F.2d 584, 585 (6th Cir. 1981); *United States* v. *Wright*, 627 F.2d 1300 (D.C. Cir. 1980)—district court did not abuse its discretion in failing to *sua sponte* raise insanity defense over defendant's objection where although defendant's capacity to conform his conduct to requirements of law at

time of offense was doubtful, there were sound reasons for both defendant's and the trial court's decision not to raise the defense, e.g., the defendant would prefer a finite criminal sentence rather than exposure to an indeterminate commitment.

In sum, the instant decision of the Second Circuit misapplies the flexibility contemplated in the *Pate* rule, detracts from the integrity and finality of guilty pleas, usurps the reasoned choice of defendant's in making tactical decisions regarding guilty pleas and is irreconcilable in principle with decisions of, *inter alia*, the Ninth Circuit Court of Appeals.

Accordingly, the decision of the United States Court of Appeals for the Second Circuit should be reversed and the petition for a writ of habeas corpus denied.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 27, 1983

Respectfully submitted,

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APPENDICES

APPENDIX A

Decision of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 535—August Term, 1982

Argued: December 2, 1982 Decided: April 12, 1983

Docket No. 82-2028

NORMAN SILVERSTEIN,

Petitioner-Appellant,

against

ROBERT HENDERSON,

Respondent-Appellee.

BEFORE:

LUMBARD, MANSFIELD and KEARSE,

Circuit Judges.

Norman Silverstein appeals from a January 6, 1982, decision of the District Court for the Southern District of New York (Stewart, J.) dismissing his petition for a writ of habeas corpus. After refusing to consider an unrelated, unexhausted claim, the district court held that federal consideration of the claim that Silverstein had been incompetent to stand trial was barred by the state to it's finding of procedural default for failure to raise the competence issue on direct review of his conviction.

Reversed and remanded with orders to issue the writ.

MICHAEL YOUNG, ESQ., New York, N.Y., for Petitioner-Appellant.

GEORGE C. PERRY, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Gerald J. Ryan, Assistant Attorney General, New York, N.Y., of counsel) for Respondent-Appellee.

LUMBARD, *Circuit Judge*:

Norman Silverstein appeals from a January 6, 1982, order of Judge Stewart in the Southern District of New York dismissing his petition for a writ of habeas corpus. Silverstein is imprisoned in the New York State correction facility at Auburn, serving a nine-to-eighteen year sentence for armed robbery. The heart of his claim is that he was incompetent to stand trial and that his guilty plea was thus constitutionally void. The district court held, however, that relief on this claim was barred because Silverstein had neglected to raise the issue on his direct appeal. We reverse and direct that the writ be issued.

Silverstein is, allegedly, retarded and illiterate. He has an I.Q. of 74 and, according to one of his doctors, the mental age of a seven-year-old. He has not developed intellectually beyond the second grade level. He has a long institutional history, having been committed to Rockland State Hospital three times and held for observation at least once at Bellevue and Mid-Hudson State Hospitals. He has been diagnosed as possibly schizophrenic.[1]

1. Because no hearing into Silverstein's competence has ever been held, the facts concerning Silverstein's competence have never been established. These allegations, the precise details of which we do not rely on in reaching our decision, are, in any event, not controverted by the state on this appeal.

In 1976, Silverstein was arrested and indicted in Bronx County on several charges growing out of three "gun-point" robberies allegedly committed with an accomplice. He was released on bail, defaulted and was arrested again on March 4, 1977.

One month later, about April 6, 1977, pursuant to a court order, Silverstein was examined by two psychiatrists. Both agreed he was incompetent to stand trial. On April 12th Justice Goldfluss, of the New York Supreme Court in Bronx County, accepted the psychiatrists' report. The court stated for the record, "having examined such . . . report, . . . it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him or to assist in his defense." Accordingly, the court ordered Silverstein detained at Bellevue, pending transfer by the State Department of Mental Hygiene.

One week later, on April 19th, the Mid-Hudson Psychiatric Center informed the Bronx County district attorney that a third psychiatrist had found Silverstein competent to stand trial, allegedly on the basis of one fifteen-minute interview. In proceedings on May 20th, Justice Goldfluss accepted this third psychiatric report. A few moments later, per an agreement with the Bronx County district attorney, Silverstein pled guilty to one count of robbery in the first degree, armed robbery, under N.Y. Penal Law § 160.15(2) (McKinney 1975). All remaining charges were dropped. Neither the court nor Silverstein's counsel suggested that the disagreement between the three psychiatrists be resolved at a hearing, as required by N.Y. Crim. Proc.

Law § 730.30(4) (McKinney, 1971).[2] Indeed, no hearing into Silverstein's competence to stand trial or to make a plea bargain was ever held.

The sentencing proceeding on June 21, 1977, again demonstrated Justice Goldfluss' knowledge that Silverstein "has had without a question a psychiatric history," including a series of institutionalizations. The court expressed its "feeling that this defendant has a mental problem but the community must be protected against a defendant who [is] . . . a dangerous person and I am [,] in sentencing this defendant [,] making a specific recommendation . . . that [he] receive[] psychiatric care. In my opinion it is essential because . . . someday he will be discharged [and] we must make every effort to see that he is not discharged in the same mental manner in which he goes in." The court sentenced Silverstein to nine to eighteen years in prison.

Silverstein appealed his conviction. The psychiatric report finding him incompetent to stand trial apparently did not become part of the record.[3] Appellate counsel, who

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2. Section 730.30(4) requires a hearing on competence whenever the examining psychiatrists are not of unanimous opinion. Alternatively, on the theory that the two-week period between the examinations makes the second examination stand apart as an independent inquiry into defendant's state of mind, § 730.20 requires the court to seek the opinion of *two* psychiatrists. Thus, however the situation is viewed, Silverstein's competence was not determined in accordance with Article 730.

3. The record establishes only that the third psychiatric report, finding Silverstein competent to stand trial, became part of the record on Silverstein's direct appeal to the New York Appellate Division. In the "Affirmation in Opposition" to Silverstein's collateral attack in state court on his conviction, the state argued that "with regard to the allegation that he was incompetent to stand trial, the lower court at the plea proceedings contained a psychiatric report finding defendant competent. Since this report was part of the record below and since defendant's appellate counsel received a copy of it . . . defendant

(footnote continued on next page)

had not represented the defendant at trial, was allegedly never made aware of the conflicting psychiatric opinion concerning Silverstein's competence. In any event, appellate counsel failed to urge incompetence as a ground for vacating the conviction. Counsel failed to argue that the trial court had not complied with the procedural requirements of § 730.30 for determining competence. Counsel appealed only on the ground that the sentence was excessive in light of the defendant's diminished mental capacity and his lack of intent to harm his victims. The Appellate Division affirmed without opinion, 65 A.D.2d 679 (1978), and leave to appeal to the Court of Appeals was denied (Nov. 28, 1978).

On September 20, 1980, Silverstein, acting *pro se*, commenced the series of proceedings that culminated in this appeal. He petitioned the New York Supreme Court, Bronx County, under N.Y. Crim. Proc. Law § 440.10 (McKinney 1971) to vacate his conviction. He argued, *inter alia*, that he had never been aware of his right to a hearing on competence.[4] In any event, he argued, "petitioner although an adult is no more than a seven-year-old child incapable of understanding" his constitutional rights. Thus,

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could have pursued this issue on direct appeal." This argument implied that the first two reports finding Silverstein incompetent did not become part of the record on appeal and were not provided to Silverstein's appellate counsel. Since our resolution of this case makes it unnecessary to undertake the "cause and prejudice" analysis on *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), we find it unnecessary to remand for a hearing to determine why appellate counsel was never apprised of all the facts.

4. Silverstein also argued (1) that the trial court had accepted his plea without determining whether he had committed all the elements of the crime and whether he understood all the rights he was waiving and (2) that he had received ineffective assistance of trial counsel.

"petitioner[,] an illiterate with the mentality of a seven year old[,] waved [sic] no such rights and [neither] counsel nor court had any right to wave [sic] his rights."

The state argued in response that Silverstein's petition should be dismissed under § 440.10(2)(c), which requires denial of relief where the grounds for setting aside the conviction could have been raised on direct appeal but were not. The state argued specifically that because appellate counsel had been provided with a copy of the psychiatric report finding the defendant competent, counsel could have raised on appeal the question of defendant's competence to stand trial.[5]

Justice Goldfluss, who had first found defendant incompetent, then competent, and then accepted the guilty plea, also heard the § 440.10 motion to set aside the conviction. The court's one-sentence opinion dismissing the petition tacitly rejected the state's procedural default argument, resting the dismissal instead on the factually erroneous ground that "[t]he issues presented by the defendant have already been determined by the Appellate Division."

On December 29, 1980, Silverstein, again acting *pro se*, filed his second § 440.10 petition. Silverstein reiterated his claims that he had been incompetent to stand trial and that he had been denied his right to a proper determination of his competence under N.Y. Crim. Proc. Law art. 730 (McKinney 1971). Silverstein also complained that counsel had failed to follow his suggestions to contest on appeal his competence to stand trial.[6]

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5. *See supra* note 3.

6. In addition to the grounds alleged in the earlier petition, Silverstein also argued that he had been deprived of effective assistance of counsel on appeal and that his trial counsel had not informed him that he could testify before the grand jury in hopes of obtaining a "no bill."

The state filed no opposing papers. Justice Goldfluss dismissed the petition on the ground that it contained "nothing new or novel that hasn't been brought to the attention of either this court or the Appellate Division." The court made explicit its earlier implicit holding that the defendant's mental capacity had been "clearly brought to the attention of the Appellate Division."

On January 8, 1981, Silverstein filed a *pro se* petition for a writ of habeas corpus in the District Court for the Southern District of New York. He subsequently retained counsel, who filed supporting papers, Silverstein claimed five grounds for relief: First, that the denial of a competency hearing and the acceptance of his guilty plea when he was incompetent to stand trial deprived him of due process; second, that the court improperly accepted his plea without determining whether he had committed all the elements of the crime; third, that he had been deprived of effective assistance of counsel on appeal and at trial; fourth, that by pleading guilty he had unknowingly waived his constitutional rights to confrontation, trial by jury, etc.; and fifth, that his sentence had been based upon misrepresentations in his presentence report.[7] The district court refused to consider the fifth claim, which had not been raised as a constitutional claim in state proceedings. The court found that the remaining four claims had been exhausted, and this finding is not disputed on appeal.

The state argued that *Wainwright v. Sykes*, 433 U.S. 72 (1977, bars the federal court from reaching the merits of these claims, because the state court had denied relief on an independent and adequate state procedural ground—

7. Our resolution of the competence claim makes discussion of the remaining claims unnecessary.

Silverstein's failure to raise the issues on direct appeal. In addressing this argument, the district court noted that Justice Goldfluss' express reason for denying relief—that the issues had already been determined on direct appeal—was erroneous. To determine the state court's "precise *ratio decidendi*" for denying relief, the district court looked to the papers filed by the state in the first § 440.10 proceeding. As noted above, the state had argued that Silverstein was guilty of procedural default under N.Y. Crim. Proc. Law § 440.10(2)(c) in failing to raise the issues on direct appeal. On this basis, the district court concluded that the state court must have been "thinking along procedural lines," and that this procedural ruling barred federal consideration of Silverstein's claims.[8]

II.

Here too the state urges that we may not reach the merits, because this once *pro se* petitioner has not successfully wound his way through the labyrinthine procedural requirements surrounding federal habeas relief. We disagree.

The state argues, somewhat mysteriously, that the district court "blatantly ignored the Supreme Court's interdict" by "outright refus[ing] to adhere to the doctrine of *Rose* [*v. Lundy*]," 102 S. Ct. 1198 (1982), a case decided three months *after* the district court filed its decision in *Rose v. Lundy* requires the district courts to dismiss any habeas petiton containing both exhausted and unexhausted claims; after such a dismissal, the petitioner would be free

8. Although the court held that the ineffective assistance of counsel claim based on failure to seek suppression of an involuntary confession was not barred by procedural default, it concluded that this claim was without merit.

to strike from his papers all references to the unexhausted claims and to resubmit the petition to the federal court. However, following this Circuit's pre-*Rose* procedure, the district court simply refused to consider in any way the unexhausted claim, while going on to pass on the remaining grounds for relief.

We are confident that had *Rose* been the law, the district court would have required either the refiling of the amended petition or the substantial equivalent. However, because the state "failed" to raise the *Rose* issue before the district court,[9] the district court did not follow the precise dismissal litany. And thus the state now urges that we vacate the opinion below and remand the case so that the district court can formally dismiss the petition, Silverstein can then amend and refile his petition, the district court may then reconsider the amended petition and come to the same decision and send the case back to us.

We see no merit in this proposal. We hold that the *Rose* requirements were satisfied when the petitioner stated in his brief, in oral argument, and in a letter to this court that he was withdrawing his unexhausted claim and all references to the elements of that claim in his briefs and in his habeas petition. *See Rock v. Coombe*, 694 F.2d 908 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3567 (U.S. Jan. 28, 1983); *Guthrie v. Warden*, 683 F.2d 820, 821 n.1 (4th Cir. 1982).

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9. We, of course, place no weight on the state's failure to raise the issue of the total exhaustion requirement in the district court. For the state executive branch may not ordinarily have the power to waive the deference due state courts. Nevertheless, we note that exhaustion is not jurisdictional; rather, it reflects more flexible principles of comity. *Darr v. Burford*, 339 U.S. 200, 203-11 (1950); *United States ex rel. Johnson v. Vincent*, 507 F.2d 1309, 1312 (2d Cir. 1974), *cert. denied*, 420 U.S. 994 (1975); *accord, Ballard v. Maggio*, 544 F.2d 1247, 1249 (5th Cir. 1977); *United States ex rel. Graham v. Mancusi*, 457 F.2d 463, 468 (2d Cir. 1982).

In *Rock v. Coombe, supra,* this court rejected a suggestion similar to the state's proposal where the district court, in a decision rendered after the Supreme Court decided *Rose,* had "ignored the dictates of *Rose v. Lundy* and dealt with the exhausted claims on the merits," *id.* at 914. In this situation, we permitted the petitioner to comply with *Rose* by withdrawing and bandoning his unexhausted claims at the appellate level. We saw "no reason to require the court to go through the jejune exercise of dismissing the petition and requiring that a new piece of paper be filed." *Id.* Any other result would have construed the petitioner's right to narrow his petition in order to submit only his exhausted claim "as a right encased in rigid formality." *Id.*

We believe that this appeal from a decision issued prior to *Rose* presents, if anything, an even stronger case for applying the total exhaustion rule by requiring the petitioner to withdraw his unexhausted claims at the appellate level.[10] Since Silverstein's exhausted and unexhausted

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10. We note that the Court of Appeals are apparently divided on the question of *Rose's* retroactive application. *Compare Bowen v. Tennessee,* 698 F.2d 241 (6th Cir. 1983) (en banc) (applying *Rose v. Lundy* retroactively and remanding to the district court with instructions to dismiss), *and Jones v. Hess,* 681 F.2d 688, 695 (10th Cir. 1982) (applying *Rose v. Lundy* retroactively to require dismissal where the unexhausted claims were "arguably intertwined" with the exhausted claims), *with Guthrie v. Warden,* 683 F.2d 820, 821 n.1 (4th Cir. 1982) (declining to give *Rose v. Lundy* rigid retroactive application where petitioner had abandoned his unexhausted claims early in the case and where petitioner would simply refile amended complaint if dismissed).

The Supreme Court's application of *Rose* to, and summary treatment of, three habeas cases pending on petition for certiorari when *Rose* was decided, *Bergman v. Burton,* 102 S. Ct. 2026 (1982); *Rodriguez v. Harris,* 102 S. Ct. 1627 (1982); *Duckworth v. Cowell,* 102 S. Ct. 1626 (1982), while not entirely illuminating, do not appear to indicate that a petitioner cannot effectively withdraw an unexhausted claim in order to avoid dismissal of the petition.

claims are plainly in no way intertwined, *see Rose*, *supra* at 1204, a more formal retroactive application of *Rose* would neither serve the purposes underlying the total exhaustion rule nor so "encourage state prisoners to seek full relief first from the state courts," *id.* at 1203, as to justify an otherwise pointless and burdensome exercise in paper shuffling.

III.

The State next argues that Silverstein's failure to challenge his competence on his direct appeal constitutes a waiver of his constitutional rights under N.Y. Crim. Proc. Law § 440.10(2)(c). The state court allegedly denied collateral relief after finding waiver under the statute, and the argument goes, this finding constitutes an independent and adequate state ground immune from attack in a federal court. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Forman v. Smith*, 633 F.2d 634 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). We cannot agree. First, the New York courts could not constitutionally apply a procedural default rule to a possibly incompetent defendant. Second, the state's argument rests on an erroneous interpretation of New York criminal procedure. Finally, no New York court found Silverstein guilty of procedural default.

In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court expressly denied that a habeas petitioner could have waived his right to a competency hearing by failing to request one at trial. *Id.* at 384. For "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.*; *see Suggs v. LaVallee*, 570 F.2d 1092, 1116-17 (2d Cir.), *cert. denied*,

439 U.S. 915 (1978); *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972). Since the trial court in *Pate* had been alerted to the doubts as to the defendant's sanity, the Supreme Court rejected the claim that "no duty rested upon [the trial court] to order a hearing *sua sponte*." 383 U.S. at 378. Indeed, the trial court's failure to inquire into defendant's competence on its own motion "deprived [the petitioner] of his constitutional right to a fair trial." *Id.* at 385.

The question presented here is whether the waiver rule of *Wainwright v. Sykes*, *supra*, and *Forman v. Smith*, *supra*, applies to the right recognized by *Pate v. Robinson*. We conclude that it does not. *Wainwright* was premised on the defendant's violation of a constitutionally sound state procedural rule placing solely on the defendant the burden of contemporaneously objecting to the introduction of evidence. In contrast to *Pate*, *Wainwright* expressly rejected an argument that the Constitution both barred the state from applying such a rule and required the state to place the burden of objecting to the introduction of an involuntary confession on the trial court. *Wainwright*, *supra*, at 85-87. The Court held that under the Constitution the defendant merely had the right "at some stage in the proceedings *to object* to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness." *Wainwright*, *supra*, at 86 (emphasis in original) (quoting *Jackson v. Denno*, *supra*, at 376-77.) As to such a right, the state was entitled to treat the failure to object as a waiver.

However, *Wainwright's* waiver rule cannot apply when the basis for attacking the conviction is that the defendant is incompetent to stand trial, and thus incompetent to

"waive" his rights. *Zapata v. Estelle*, 588 F.2d 1017, 1021 (5th Cir. 1979). Thus, when the trial court neglects the duty to conduct a hearing on competence, the defendant's failure to object or to take an appeal on the issue will not bar collateral attack. *Hayes v. United States*, 468 F. Supp. 179, 184 (S.D. Tex. 1979).

B.

We do not believe that the New York courts would reach a contrary result. For New York law provides the procedural protection *Pate* requires. The New York Court of Appeals has held that when the demeanor of the defendant or other evidence raises doubt as to his competence to stand trial, it is the trial court's duty to order a hearing *sua sponte*. *People v. Gonzalez*, 20 N.Y.2d 289, 293 (1967), *reaffirmed in People v. Armlin*, 37 N.Y.2d 167, 171 (1975); *see People v. Smyth*, 3 N.Y.2d 184, 187 (1957). And New York Criminal Procedure Law § 730.30(4) specifically requires the court to order a hearing on its own motion when, as here, the examining psychiatrists disagree on the defendant's competence. *See also People v. Bradt*, 77 A.D.2d 795 (1980) (error not to order hearing where reports finding defendant competent were conclusory and where evidence suggested incompetence); *People v. Candella*, 49 A.D.2d 800, 801 (1975) (same).

Thus, we are convinced that the New York courts would reject the argument that, by failing to raise the issue on direct appeal, Silverstein forfeited or waived his right to contest his competence to stand trial.[11] Indeed, citing *Pate*

11. Thus, even if our interpretation of Justice Goldfluss's ruling, *infra*, were incorrect and he had denied relief on the basis of a finding of procedural default, this finding would not be dispositive in a fed-

(footnote continued on next page)

v. Robinson, the New York Court of Appeals has held that neither the failure to object at trial to inadequacies in the determination of competency nor the failure even to raise the issue at trial will bar the defendant from raising the issue for the first time on appeal. *People v. Armlin, supra*, at 170-72; *People v. Bangert*, 22 N.Y.2d 799, 800 (1968). Thus, if the trial court has been alerted to the defendant's mental problems and fails to order a hearing on competence, the conviction will be set aside on collateral review, even though the defendant failed to challenge his competence at trial, failed to request a competency hearing, and failed to appeal the issue. *People v. Freyre*, 76 Misc. 2d 210 (Sup. Ct. 1973).

C.

Finally, we believe that the state court denied collateral relief on the mistaken ground that the question of competence had already been fully litigated, rather than the ground that Silverstein had not appealed on the basis of

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eral habeas proceeding. As noted above, *Wainwright* invoked the "well-established principle of federalism that a station decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Id.* at 81 (citations omitted). However, this immunity is not absolute, in either the substantive or the procedural context. For it is equally well established that a state may not, in an attempt to deprive a litigant of the right to a hearing on a federal claim, manipulate its findings of law, *see Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 379 (1813), (overruling Virginia Supreme Court finding of law that an inquest of office was not necessary to vest land in the Commonwealth), or fact, *see Summer v. Mata*, 449 U.S. 539, 548 (1981); *Maxwell v. Summer*, 673 F.2d 1031, 1035-36 (9th Cir.), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982). Thus, an unsupported or manipulative finding of procedural default would not constitute an adequate state ground barring federal habeas relief.

his incompetence.[12] The state court's terse opinion in the first § 440 proceeding simply notes that all of the issues raised in Silverstein's petition "have already been determined by the Appellate Division." In ruling on the second § 440 proceeding, the state court was more explicit: As to the claim that the petitioner "was mentally incompetent at all times," Justice Goldfluss noted that the "underlying rationale in [Silverstein's direct appeal,] which was clearly brought to the attention of the Appellat Division, is that the defendant is retarded." Thus, "[t]here is nothing new or novel [in the petition] that hasn't been brought to the attention of . . . the Appellate Division. Consequently, the application and the motion made *pro se* is denied."

These remarks indicate that the state court denied Silverstein's motion to vacate his conviction under N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 1971), which requires the court to deny relief when "[t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment." Erroneous or not, this ruling does not constitute a finding of procedural default that would bar federal consideration of Silverstein's claims. *Maxwell v. Sumner*, 673 F.2d 1031, 1034 (9th Cir. (*Wainwright v. Sykes* inapplicable when state denies habeas relief on ground that petitioner's arguments had been rejected on appeal), *cert. denied*, 103 S. Ct. 313 (1982).

In sum, under *Wainwright*, Silverstein's failure to allege on direct appeal that he was incompetent does not bar

12. Because the evidence as to the state court's holding is entirely documentary, we are as competent to pass on this factual question as the district court. *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. (1979), *cert. denied*, 445 U.S. 946 (1980); *Jack Kahn Music v. Baldwin*, 604 F.2d 755, 758 (2d Cir. 1979).

federal habeas relief.[13] The New York courts did not, would not, and constitutionally could not find that Silverstein had waived his right to challenge his conviction on the ground that he was incompetent to stand trial.

IV.

We now turn to the merits of the petitioner's claim. We have held that the trial court must order a hearing when there is "reasonable ground" for believing that the defendant may be incompetent to stand trial. *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972).[14] Recognizing that there are "no fixed or immutable signs which invariably indicted the need for further inquiry to determine fitness to proceed," *Drope v. Missouri*, 420 U.S. 162, 180 (1975), we hold that in light of the undisputed facts, there were sufficient indicia of incompetence before the trial court to require a hearing. The state trial court had before it the reports of three psychiatrists. The mere fact that the last of these reports

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13. Even if *Wainwright v. Sykes* were applicable, we believe that petitioner would be entitled to a hearing as to the "cause" for his failure to raise the issue of competence on direct appeal. *See supra* note 3.

We also believe that the defendant could show adequate "prejudice" under *Wainwright*. The acceptance of petitioner's plea in the absence of a hearing to establish competence establishes prejudice in that it so infected the process "that the resulting conviction violates due process." *United States v. Frady*, 102 S. Ct. 1584, 1595 (1982) (quoting *Henderson v. Kebbe*, 431 U.S. 145, 146-47 (1973)). We believe that this "fundamental miscarriage of justice" meets the prejudice standard of *Wainwright v. Sykes*. *See United States v. Frady*, *supra*, at 1596; *Engle v. Isaacs*, 102 S. Ct. 1558, 1575 (1982).

14. *See also Acosta v. Turner*, 666 F.2d 949, 954 (5th Cir. 1982) (requiring a hearing when there is a "bona fide doubt" as to competency); *United States v. Hayes*, 589 F.2d 811, 823 (5th Cir.) ("substantial" doubt), *cert. denied*, 444 U.S. 847 (1979).

found the petitioner competent to stand trial did not suffice to settle the question, given that two psychiatrists had submitted contrary reports just a few days before.[15] The doctors' disagreement gave the trial court reasonable grounds for doubting that Silverstein was competent to stand trial. Moreover, this doubt could only have been reinforced by the presentence report noting Silverstein's long institutional history and earlier diagnoses finding him retarded and possibly schizophrenic. *Saddler v. United States*, 531 F.2d 83, 86-87 (2d Cir. 1976). In these circumstances, the trial court's failure to order a hearing, *sua sponte* if necessary, violated the defendant's right to a fair trial. *Pate v. Robinson*, *supra*, at 385.

If the defendant were in fact incompetent at the time of trial, the acceptance of his plea would be void as a violation of due process. *Suggs v. Lavalee*, 570 F.2d 1092, 1116 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978). However, we doubt that a meaningful hearing on the question of the defendant's competence to stand trial at the time of his plea almost six years ago, on May 20, 1977 could be held at this late date. *See Drope v. Missouri*, *supra*, at 183 (adequate hearing not possible five years after conviction); *Pate v. Robinson*, *supra*, at 387 (likewise for six years after conviction). A retrospective determination of Silverstein's competence to stand trial would have to be based on three

15. The Ninth Circuit reached a different conclusion in a case where the third psychiatric report finding the defendant competent to stand trial was based on interviews conducted five months after two psychiatrists had found the defendant incompetent. *United States v. Caplan*, 633 F.2d 534, 539-42 (9th Cir. 1980). The defendant's status had apparently improved under interim psychiatric treatment. Because there was no other specific evidence of the defendant's alleged incompetence, the court of appeals held that it had not been an abuse of discretion not to conduct a competency hearing upon receipt of the third report.

conflicting written reports, a cold, sparse record, and the recollection of those who saw and dealt with him six years ago. Such a hearing would be a wholly inadequate substitute for the "concurrent hearing" into competency mandated by *Pate*. *Pate, supra,* at 387; *see Drope v. Missouri, supra; Dusky v. United States,* 362 U.S. 402, 403 (1960).[16] Accordingly, we reverse and direct the issuance of the writ of habeas corpus unless the state brings Silverstein to trial within a reasonable time.[17]

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16. *Cf. McCarthy v. United States,* 394 U.S. 459, 470 (1969) (because of doubts about the voluntariness of defendant's guilty plea, the court set aside the conviction rather than order a hearing into voluntariness, holding that "[t]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (emphasis in original)).

17. We have not been in any way concerned with whether Silverstein may have been legally responsible for the crimes with which he has been charged. Consequently, nothing we have said is to be construed as an expression of opinion on that issue.

APPENDIX B

Decision of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

81 Civ. 489 (CES)

NORMAN SILVERSTEIN,

Petitioner,

against

ROBERT HENDERSON,

Respondent.

MEMORANDUM DECISION

STEWART, District Judge:

Petitioner Norman Silverstein seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1976). Currently serving a nine to eighteen year sentence imposed upon his plea of guilty to the charge of robbery in the first degree, petitioner seeks habeas relief on the grounds of ineffective assistance of counsel, improper allocution as to the elements of his crime at the time of his plea, and use of an erroneous presentence report in the setting of his jail term. In a brief intended to supplement petitioner's pro se application, counsel for petitioner raise the additional issue of a denial

of due process in the state's failure to provide a competency hearing prior to accepting petitioner's plea.

A. Exhaustion of state remedies

Before addressing the merits of petitioner's claims, several procedural matters must be considered. The first is the statutory requirement of exhaustion of state remedies prior to application for habeas relief. 28 U.S.C. §2254(b) (1976). The record in this case shows that petitioner has fully pursued the grounds of ineffective assistance of counsel, improper allocution, and the need for a competency hearing in state coram nobis actions. These claims thus meet the requirements of 28 U.S.C. §2254(b) (1976). The erroneous presentence report point, however, has apparently never been argued in state court as a matter of federal constitutional law. It thus fails to meet this threshold test. *See Wilson* v. *Fogg*, 571 F.2d 91, 92 (2d Cir. 1978). Habeas relief upon this latter ground is therefore not available.[1]

B. Grounds for state court's denial of petitioner's claims below

The second procedural point to be considered before reaching the merits of petitioner's application is a determination of the grounds for the denial of the petitioner's coram nobis motions by the New York State Supreme Court. Under the rule of *Wainwright v. Sykes*, 433 U.S.

1. Admittedly, petitioner's brief to the state Appellate Division in his direct appeal did mention the existence of errors in the presentence report on several occasions. But at no time did the brief cast the error as one of federal constitutional moment, nor cite federal or state authority to that effect. In sum, petitioner has failed to present the state court with the *same claim* he urges upon the federal court". *Picard* v. *Connor*, 421 U.S. 270, 276 (1971) (emphasis added).

72, 87 (1977), as extended by the Second Circuit in *Forman v. Smith*, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 1710 (1981), if the state court denied petitioner's coram nobis motions for his failure to comply with state procedural rules regarding constitutional claims at the appellate level, habeas review is available in this court only upon a showing of cause for the noncompliance, as well as prejudice resulting from the claimed violation. As petitioner made two motions under N.Y. Crim. Proc. Law §440.30 (McKinney 1971) to vacate the judgment against him, and since under state law denial of one coram nobis action is not *res judicata* as to a later petition on the same ground, *see People* v. *Newkirk*, 41 App. Div. 2d 744, 341 N.Y.S.2d 146, 147 (1973), *cert. denied*, 414 U.S. 1132 (1973), we examine the grounds for the denial of each.

1. First coram nobis motion

In his first coram nobis motion, petitioner raised the issues of ineffective assistance of trial counsel, improper allocution, and unknowing waiver of constitutional rights. Because the decision of the state court does not reveal the precise *ratio decidendi* for the denial of petitioner's motion,[2] we turn to the state's opposition papers on this motion. *See Gruttolo v. Hammock*, 639 F.2d 922, 929 (2d Cir. 1981). There we find that the state had argued that the

2. The court's endorsement decision reads: "[u]pon the foregoing papers the pro se motion is denied. The issues presented by the defendant have already been determined by the Appellate Division (see People v. Silverstein, 65 A.D.2d 679)." Since the Appellate Division had affirmed petitioner's conviction without an opinion, the citation is not particularly helpful. Moreover, since the petitioner also had argued only the excessiveness of his sentence in his direct appeal, and not any of the constitutional points raised in the coram nobis motion, the grounds stated are particularly puzzling.

procedural requirements of New York Crim. Proc. Law §440.10(2)(c) (McKinney 1971)[3] barred claims as to the incompetency of counsel for failure to contest the findings of a psychiatric report finding petitioner competent, allocution as to the underlying facts of the crime to which he pleaded guilty, and unknowing waiver. As to the claim of ineffective assistance of counsel due to failure to request a *Wade* or *Huntley* hearing, the District Attorney argued that petitioner had "failed to allege facts sufficient to suggest that he might have been entitled to . . . the suppression of his identification and confession at trial . . .". *Aff. in Opp.* ¶7.

On this record, we hold that the New York Supreme Court denied petitioner's claims of ineffective assistance of counsel for failure to contest petitioner's competency, improper allocution and unknowing waiver on state procedural grounds. As was the case in *Brown* v. *Reid*, 493 F. Supp. 101, 103 (S.D.N.Y. 1980), we find that the arguments made by the state's attorney on these points strongly suggest that the court was "thinking in procedural terms". Habeas review of these claims in this court will thus depend upon a proper showing of cause and prejudice as required by *Forman* v. *Smith*, *supra*, 633 F.2d at 640. We further

3. N.Y. Crim. Proc. Law §440.10(2)(c) provides:

[n]otwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

. . . .

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

hold, however, that the state court did *not* reject petitioner's claim of ineffective assistance of counsel for failure to request a *Wade* or *Huntley* hearing for procedural reasons, but rather, dismissed it on the substantive ground of a failure of proof. *See* N.Y. Crim. Proc. Law §440.30(4)(b) (McKinney) (1971). Direct review of this claim will thus follow.

2. Second coram nobis motion

Petitioner brought his second coram nobis action some two months after the denial of the first. In it, he raised the issue of the ineffectiveness of appellate as well as trial counsel, and repeated the claim of his own incompetency during the proceedings blow. Based upon a review of a transcript of the state Supreme Court justice's comments in denying this motion from the bench, we conclude that the issues of petitioner's competency and the ineffectiveness of appellate counsel were denied on procedural grounds and thus reviewable in this court only upon a showing of proper cause and prejudice. We quote the relevant passages from this transcript in the margin.[4] We further find, however,

4. With respect to the petitioner's competency, the state court judge stated:

> Let the record also indicate that the defendant's conviction was affirmed by the Appellate Division. People against Silverstein, 65 A.D.2d 679. And although the basis, apparently, of the appeal was excessive sentence, the underlying rationale in that application, which was clearly brought to the attention of the Appellate Division, is that the defendant is retarded—that's the allegation that he's retarded—who acted without intent to inflict physical injury during the commission of the crime of which he was convicted.

Minutes of Proceedings at 3.

(footnote continued on next page)

that the claim of ineffective assistance of trial counsel with respect to the failure to request a *Wade* or *Huntley* hearing continues to be directly reviewable, as the state court justice's comments on this point confirm our findings above that this issue was dismissed on the merits in the first motion. We quote these comments in the margin as well.[5]

C. Cause and prejudice with respect to petitioner's forfeited claims

The brief submitted by counsel on petitioner's behalf argues that petitioner should not be barred from asserting in this court constitutional issues rejected by the state court on procedural grounds because these procedural errors can be traced to the ineffectiveness of petitioner's appellate counsel. We believe the formally correct response to this argument is to note that the effectiveness of appellate coun-

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With respect to the rest of petitioner's claims, the state court noted:

> There must be a time where litigation must cease. And this defendant has been given every opportunity to have these issues brought before the Appellate Division. There is nothing new or novel that hasn't been brought to the attention of either this Court or the Appellate Division.
>
> . . . .
>
> I'm deciding this on the fact that it's been previously determined. And I'm terminating litigation on this matter. It's not being decided on the merits, its being decided because there's been a prior adjudication.

Id. at 3-4. These statements suggest that the state court considered relief barred by either N.Y. Crim. Proc. Law §440.10(2)(c) (quoted in n.3, *supra*,) or §440.10(3)(c), which provides for the denial of motions to vacate when the defendant could have raised the ground in a previous motion under Section 440 but failed to do so.

5. With respect to petitioner's claim of ineffective assistance of counsel, the state judge responded: "The sufficiency of the assistance of counsel was passed on the issue by me on a prior decision which was rendered on or about the 22 of October, 1980." Minutes of Proceedings at 3.

sel was a matter considered and rejected by the state court below on adequate and independent (procedural) grounds. However, to ensure that substantive justice is not lost in the labyrinth of procedural requirements that confronted this once *pro se* applicant, we have briefly reviewed the merits of this claim of ineffectiveness of appellate counsel, and find them insubstantial. We set forth our findings on this point in the margin.[6] Petitioner has not shown sufficient cause for his noncompliance with the procedural re-

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6. We have thus reviewed the adequacy of petitioner's appellate counsel with respect to the failure to contest petitioner's competency, and the failure to question the trial court's allocution of the petitioner regarding the factual basis of the plea. We do not find that appellate counsel's actions with respect to these issues was below the level of "reasonable competence", *see United States* v. *Aulet*, 618 F.2d 182, 187 (2d Cir. 1980), let alone so "woefully inadequate 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice'", *United States* v. *Carrier*, 405 F.2d 1039, 1043 (2d Cir. 1969) (quoting *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950)). We note that a psychiatric report from the Mid-Hudson Psychiatric Center found petitioner competent to stand trial. We further note that petitioner's colloquy with the court when he entered his plea strongly suggests that the petitioner in fact had the capacity to understand the proceedings against him, and to assist in his own defense. *See* Minutes of Plea Proceeding at 6-7. Thus, the trial court's failure to call for a competency hearing (and appellate counsel's failure to raise this issue on appeal) presented no constitutional error. *See United States ex rel. Donaldson* v. *Henderson*, 346 F. Supp. 749, 750-51 (S.D.N.Y. 1972). Nor can we say that appellate counsel was ineffective in its failure to question the trial court's allocution of the petitioner regarding the factual basis of the plea. The minutes of the plea proceeding show that the trial judge established that the petitioner had committed all the elements of robbery in the first degree, namely, the forcible stealing of property with the display of what appeared to be a pistol. Since under New York law, possession of a weapon actually capable of causing death is not a necessary ingredient of the offense of robbery in the first degree, *see Farrell* (*Czarnetzky*), 560 F.2d 381, 382 (2d Cir. 1977) *cert. denied*, 434 U.S. 1077 (1978), the petitioner's statement that he used a toy gun did not render the judge's inquiry inadequate. As we also find that trial counsel's assistance with respect to pretrial suppression hearings was not ineffective, *see infra* at 5, we cannot say appellate counsel's failure to raise this point rendered his assistance ineffective either.

quirements below. His forfeited claims are thus not reviewable by this court.

D. Ineffective assistance of counsel by failure to seek suppression of involuntary confession

The final point we address concerns the failure on the part of petitioner's trial counsel to seek the suppression of an allegedly involuntary confession made by petitioner to the police prior to advising petitioner to enter a plea of guilty to one count of robbery in the first degree.[7] Petitioner claims that such failure constituted an ineffective assistance of counsel, and thus denied him rights guaranteed by the Sixth and Fourteenth Amendments. Since the "farce and mockery of justice" standard established in *United States* v. *Wight*, 176 F.2d 376, (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) has recently been questioned in this circuit, *see United States* v. *Aulet*, 618 F.2d 182, 187 (2d Cir. 1980), we evaluate petitioner's claim by the more liberal standard of "reasonable competence" adhered to by several other circuits. Yet even under this more lenient standard, we do not find petitioner entitled to habeas relief on this ground. The failure to make even presumably meritorious pretrial suppression motions does not automatically lead to the conclusion that counsel was ineffective or incompetent under either the "farce and mockery" or "reasonable competence" standard. *Indiviglio* v. *United States*, 612 F.2d 624, 629 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980). Rather, a petitioner asserting such a claim must establish actual, not possible, prejudice by virtue of the attorney's decision. *United States* v. *Aulet*, 618

7. While petitioner's application also refers to counsel's failure to request a *Wade* hearing on the issue of identifications made of petitioner, petitioner has presented no facts suggesting why such identifications were invalid. We accordingly deny this claim.

F.2d at 188 (citing *LiPuma* v. *Commissioner, Department of Corrections*, 560 F.2d 84, 90 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977)). In this case, neither petitioner nor his counsel have offered any argument as to prejudice suffered by petitioner by virtue of his trial counsel's failure to move for the suppression of his confession. The facts of this particular case, moreover, suggest that such a motion, even if successful, might well have had little effect on the ultimate sentence petitioner received. The count of robbery to which the petitioner pleaded guilty involved the forcible stealing of a sum of currency from one Bruno Spadafora in a pizza store in the morning hours. Transcript of Plea Proceedings at 3-4. That Mr. Spadafora, or other credible eyewitnesses, would have been available to support the state's case is quite likely. Petitioner's co-defendant, who received a sentence of zero to seven years upon his plea of guilty, might also have been available to testify adversely to the petitioner. As a predicate felon, petitioner faced a potential sentence of twenty-five years on the robbery count alone. *See* N.Y. Pen. Law §70.06(3) (McKinney) (Supp. 1980). We note that petitioner's plea in the state court below also covered a second indictment which contained charges of five class D felonies, one class E felony, and three class E misdemeanors. Under these circumstances, the failure to move for the suppression of the alleged unlawful confession before advising a plea of guilty to one count of robbery in the first degree was not an ineffective assistance of counsel. We accordingly deny this petition and dismiss the case.

So Ordered.

/s Charles E. Stewart, Jr.

United States District Judge

Dated: New York, New York
December 30, 1981

APPENDIX C

Plea Proceeding *People* v. *Norman Silverstein*

THE SUPREME COURT
OF THE STATE OF NEW YORK

BRONX COUNTY: TRIAL TERM PART 14

Indictment numbers 475-77, 994-76

THE PEOPLE OF THE STATE OF NEW YORK,

against

NORMAN SILVERSTEIN,

Defendant.

PLEA

Bronx, New York
May 20, 1977

BEFORE:

HONORABLE HOWARD E. GOLDFLUSS,
Justice

APPEARANCES:

MARIO MEROLA, ESQ.,
District Attorney, Bronx County
BY: BOBRA LYLES, ESQ.,
Assistant District Attorney

OTTO FUSCO, ESQ.,
Attorney for the Defendant
BY: A.F.X. HENRIKSEN, ESQ.,
of Counsel

GARY J. DOBKIN
Court Reporter

FILED
Nov. 28, 1977
SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

The Court Clerk: Numbers 21 and 22. Norman Silverstein.

(The defendant, his counsel, and the Assistant District Attorney are present.)

The Court: Do we have a return on the psychiatric report?

The Court Clerk: Yes.

The Court: Has it been confirmed?

The Court Clerk: No.

The Court: Then we shall confirm it now.

Mr. Henriksen: If your Honor pleases, at this time on behalf of my client, Norman Silverstein, I have an application under Indictment number 994 of 1976 to the effect that my client now offers to withdraw his previously entered plea of not guilty and offers to plead guilty under the first count of said indictment to robbery in the first degree in satisfaction of that indictment as well as Indictment 475 of 1977 and all other outstanding charges in this County and it is our understanding that in accepting or offering to take such a plea that your Honor at the time of sentence will include and cover the pre-probation status of Mr. Silverstein.

The Court: Before acting any further, do you move to confirm the psychiatric report?

Mr. Henriksen: Yes, I thought I did. I do so now.

The Court: It had been returned from mid-Hudson and that this defendant had been found to be competent to proceed. So confirmed. Now, this is to cover probation status, but not parole.

Mr. Henriksen: There had been no parole.

Ms. Lyles: May I proceed, your Honor?

The Court: Yes.

Ms. Lyles: Your Honor, the plea to the first count of Indictment number 994 of 1976 is agreeable to the People.

It's the understanding that this plea is to cover 475 of 1977 and to cover any bail jumping cases that the People may have or are pending against the defendant and to cover any other cases pending or in the process of pending in Bronx County, excluding any A-1 felony cases.

Your Honor, the facts of the case is that this defendant, acting in concert with one other, who had already pleaded guilty to the indictment on April 7, 1976, forcibly stole property from one Bruno Spadafora and this was, to wit, a sum of U.S. currency. This occurred at 1042 Morris Park Avenue. It was a pizza store and the robbery occurred at approximately 11:55 P.M. in the morning.

This defendant made a full confession as to this specific robbery and to two other robberies also contained in the indictment before the Court.

Your Honor, the People believe the fact the defendant is relieving the People of the responsibility of proving that this defendant was guilty of these three robberies on Indictment 994 of 1976 and the new indictment of 475 of 1977, which involves perjury in the second degree, assault in the second degree, and grand larceny in the first degree, that the plea to the first count of Indictment 994 of 1976 and the agreement that the defendant in taking this plea, that the People will agree to a sentence of nine to eighteen years is sufficient to cover these cases before the Court and we ask that the Court accept the plea and the sentence as agreed upon between the People, the Court, and the defendant.

The Court: May I have the indictment, please? Now, are you Norman Silverstein?

The Defendant: Yes, sir.

The Court: Now Mr. Silverstein, did you speak to your lawyer before you entered this plea of guilty?

The Defendant: Yes.

The Court: Did you speak to him?

The Defendant: Yes, sir.

The Court: All right. And you understand that when you plead guilty, you give up your right to a trial; do you understand that?

The Defendant: Yes, I believe so.

The Court: Well, do you understand that a plea of guilty has the same meaning as if you had been found guilty after trial; do you understand that it means the same thing as if you had gone to trial and had been convicted? Do you understand that?

(Whereupon, the defendant and his counsel confer off the record at counsel table.)

The Defendant: Yes, sir.

The Court: All right. And when you plead guilty, Mr. Silverstein, do you understand you give up all of your rights that a trial would give you; do you understand that?

The Defendant: Yes.

The Court: Such as the right to testify in your own behalf and to call witnesses in your own behalf and you, through your counsel, to cross-examine witnesses who may testify against you. You give up all those rights by pleading guilty and by admitting your guilt.

The Defendant: Yes.

The Court: Now, you pled guilty to robbery in the first degree, the first count of Indictment 994 of 1976. The facts are as follows: On or about April 7th, 1976, you forcibly stole certain property from one Bruno Spadafora, and that property was a sum of U.S. currency and in the course of the commission of the crime and of the immediate flight therefrom, you did have in your possession and displayed what appeared to be a pistol. Are you guilty of that charge?

The Defendant: It was a toy gun, your Honor, but I am guilty.

The Court: It was a toy gun, but it appeared to be a pistol, but it was a toy gun?

The Defendant: A toy gun.

The Court: Now, did you commit that act?

The Defendant: Yes, sir.

The Court: Are you guilty of that charge?

The Defendant: Yes, sir.

The Court: Are you saying you are guilty because you are in fact guilty and for no other reason?

The Defendant: Yes, sir.

The Court: And are you making this plea of guilty or entering this plea of guilty voluntarily of your own free will?

The Defendant: Yes, sir.

The Court: And has anybody forced you or compelled you to plead guilty to this case?

The Defendant: No.

The Court: Now, you understand that this indictment—this plea of guilty will cover Indictment number 475 of 1977? In other words, it will cover not only this indictment, but the other indictment for which it is on the calendar, charging you with forgery and other crimes.

The Defendant: Excuse me, your Honor. Can I say something? The forgery I haven't done.

The Court: It's covered. You are not pleading guilty to that sir; do you understand that?

The Defendant: Yes, sir.

The Court: It's covering any other charges except homicide. It's covering any other charges against you; is that true, Ms. Lyles, except homicide or A felonies?

Ms. Lyles: Yes, your Honor.

The Court: Any other charges outstanding against you, it's covering that also; do you understand that?

The Defendant: Yes, sir.

The Court: It will also cover any probation violation you have, but it will not cover any possible parole violation; do you understand that?

(Whereupon, the defendant and his counsel confer off the record at counsel table.)

The Defendant: No, I was never in jail, sir.

The Court: All right. Then that would be material, but it will cover any possible violation of probation; do you understand that?

The Defendant: Yes.

The Court: Do you understand that the agreement between your attorney and the District Attorney has been approved by the Court and has been approved by the Court; namely, that on the day of sentence you will receive a sentence—an indeterminate sentence, the maximum of which shall be eighteen years, the minimum of which shall be nine years to cover these indictments; do you understand that?

The Defendant: Yes.

The Court: Now, that is the promise made by this Court based upon the agreement made at the bench between your attorney and the District Attorney and which has been approved by the Court. Of course, this is subject to what a probation report will show, but under no circumstances will you receive more than nine to eighteen to cover all the matters I have stated on the record; do you understand that?

The Defendant: Yes, sir.

The Court: All right. Now, I have stated for the record the promise. Do you understand the promise I made?

The Defendant: Yes, I do.

The Court: Has anybody stated to you, your attorney, the District Attorney, the Court, or anybody, has anybody stated to you anything other than what I have stated for the record right now? Any other promises?

The Defendant: No.

The Court: All right. Arraign the defendant.

The Court Clerk: Norman Silverstein, the crime you are charged with is a felony. If you plead guilty to this charge and it is found within the last ten years, exclusive of any time you may have spent in jail you were sentenced on a prior conviction for a felony in this state or for an offense committed in another jurisdiction for which a sentence in excess of one year was authorized, irrespective of whether it was imposed, the Court by law must sentence you to an indeterminate sentence of imprisonment, which would carry a minimum term of imprisonment. Do you understand that?

The Defendant: Yes.

The Court Clerk: Norman Silverstein, do you withdraw your plea of not guilty heretofore entered and do you now in person plead guilty to the crime of robbery in the first degree, a class B felony, the first count of Indictment number 994 of 1976, that plea to cover the indictment and also to cover Indictment number 475 of 1977, and to cover any outstanding cases in Bronx County other than homicides; do you so plead?

The Defendant: Guilty.

The Court Clerk: Take the pedigree, please. (Whereupon, the defendant's pedigree was taken.)

The Court Clerk: Date for sentence?

The Court: The 21st of June.

Mr. Henriksen: June 21st.

* * *

I Hereby Certify that the foregoing is a true and complete transcript of the original stenographic minutes.

Gary J. Dobkin
Court Reporter

APPENDIX D

Proceedings on Motion to Vacate Judgment of Conviction

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY: PART 76

Indict. No. 994/76

THE PEOPLE OF THE STATE OF NEW YORK,

against

NORMAN SILVERSTEIN,

Defendant.

Proceedings

851 Grand Concourse
Bronx, New York
January 26, 1981

BEFORE:

HON. HOWARD E. GOLDFLUSS
Justice of the Supreme Court

APPEARANCES:

For the People:
MARIO MEROLA, ESQ.,
District Attorney, Bronx County
BY: ROBIN DOLSKY, ESQ.,
Assistant District Attorney
Defendant—PRO SE

The Clerk: Number two on the motion calendar, Norman Silverstein.

Ms. Dolsky: Robin Dolsky on behalf of the District Attorney's Office.

The Court: Upon a prior application which was made—not upon. A prior application was made by this defendant based on substantially the same grounds that he makes at the present time.

In essence, he claims he was denied the effective assistance of counsel; that he didn't have sufficient allocution at the time he pled guilty. In this particular motion he adds that, for the first time I might add, that he was mentally incompetent at all times.

Let the record also indicate that the defendants conviction was affirmed by the Appellate Division. People against Silverstein, 65 A.D. 2nd 679. And although the basis, apparently, of the appeal was excessive sentence, the underlying rationale in that application, which was clearly brought to the attention of the Appellate Division, is that the defendant is retarded—that's the allegation that he's retarded—who acted without intend to inflict physical injury during the commission of the crime of which he was convicted.

In addition, it was brought to the Appellate Division's attention the full plea bargaining agreement which was made part of the record. And it was alleged that the sentence of 9 to 18 was harsh, and unjust and excessive.

To the extent that the defendant was advised during allocution of the co equences of a plea of guilty, the Appellate Division has passed on that issue. On the excessiveness of the sentence of 9 to 18, the Appellate Division has

passed on that issue. The sufficiency of the assistance of counsel was passed on the issue by me on a prior decision which was rendered on or about the 22 of October, 1980.

There must be a time where litigation must cease. And this defendant has been given every opportunity to have these issues brought before the Appellate Division. There is nothing new or novel that hasn't been brought to the attention of either this Court or the Appellate Division.

Consequently, the application and the motion made pro se is denied. See record.

Ms. Dolsky: Your Honor, we're treating this as though People filed no motion in opposition.

The Court: I'm deciding this on the fact that it's been previously determined. And I'm terminating litigation on this matter. It's not being decided on the merits, it's being decided because there's been a prior adjudication.

• • •

This is to certify that the foregoing is a true and accurate transcript of the original stenographic record.

JOYCE FISHER

Joyce Fisher, RPR
Official Court Reporter

APPENDIX E

Sentence

THE SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF THE BRONX: PART 14

Ind. No. 994/76

THE PEOPLE OF THE STATE OF NEW YORK,

against

NORMAN SILVERSTEIN,

Defendant.

June 21, 1977
Bronx, N.Y.

BEFORE:

HON. HOWARD GOLDFLUSS

APPEARANCES:

For the People:
MS. BOBRA LYLES, ESQ.
Assistant Dist. Att.

For the Defendant:
A.F.X. HENRIKSEN, ESQ.

Albert Monaco
Court Reporter

The Clerk: Number three and number four on the sentence calendar Norman Silverstein.

Mr. Henriksen: A. Henriksen of Counsel to Fusco & Fusco for the defendant Norman Silverstein.

The Court: Arraign the defendant as a predicate felon.

The Clerk: Norman Silverstein, is that your name?

The Defendant: Yes.

The Clerk: Is Mr. Henriksen your attorney?

The Defendant: Yes, sir.

The Clerk: Norman Silverstein, the District Attorney of Bronx County has filed a statement charging you as a predicate felon, have you received a copy of that statement?

The Defendant: Yes.

The Clerk: Do you wish to controvert any allegations made in that statement?

The Defendant: No.

The Court: The defendant is found to be a predicate felon.

The Clerk: You are being arraigned on indictment number 994 of 1976 for the crime of robbery in the First Degree, does the District Attorney wish to be heard before sentence is imposed?

Ms. Lyles: Your Honor, this defendant pleaded guilty on May 20th to robbery in the First Degree. That was on indictment 994 of 1976. That plea, the People agreed that this plea will cover indictment number 475 of 1977. At that time it was agreed between the Court, the defendant and the People that the sentence to be received would be nine to 18 years. We ask that the Court adhere to that plea bargain.

Mr. Henriksen: Your Honor, I have conversed with the Court about the probation report in this case. And at the time that the plea bargain was made and I would ask at this time that the bargain be imposed.

The Clerk: You have a right to speak at this time. What do you have to say before sentence is imposed?

The Defendant: I have nothing to say, sir.

The Court: The defendant, Norman Silverstein, pleaded guilty to robbery in the First Degree to cover this current indictment number 994 of 1976 and also to cover indictment number 475 of 1977 and any possible bail jumping. And it's the intention of this Court to impose—that this sentence is to cover all outstanding arrest complaints or indictments against this defendant in this or any other County except any Felonies which may be outstanding which we have no knowledge now.

This case involves a series of robberies between April 7th, 1976 and April 13th of 1976. This defendant robbed at gunpoint the complainant Bruno Spadafora and other complainants. Each of these complainants were robbed of currency and personal property.

On April 7th, 1976 at about 11:50 PM Bruno Spadafora was in his Pizza Shop when Silverstein entered ordering a slice of pizza. He then produced a gun and announced this is a stickup and ordered the complainant to the rear of the store. Then Silverstein removed from the register one hundred and fifty eight dollars and fled.

Three days later on April 10th, 1976, at about 11:30 PM at a Pizza Store at 1422 East Gunhill Road in the Bronx the defendant walked in and ordered two slices of pizza. He then produced a gun and announced this is a stickup. He then locked the complainant in the bathroom and emptied the register of one hundred and eighty-five dollars. He fled in a 1966 blue Ford Mustang.

The Police were notified but at that time the defendant was not apprehended. Three days later, April 13th, 1976

at about 5:50 PM Thomas McKaren was in the barber shop when Silverstein entered and sat down. He got up from his seat and produced a gun and announced this is a stickup. At this time he emptied the register and stole fifty dollars and two credit cards along with personal property. The Police were notified and following an investigation of three armed robberies Detective Thomas McKaren of the Bronx robbery squad took Norman Silverstein into custody.

Now after Silverstein was arrested he was bailed out by his mother for seventy-five hundred dollars. The defendant then defaulted and a bench warrant was subsequently issued. He was later apprehended on March 4th, 1977 and was declared incompetent to stand trial and committed to the Mid Hudson Institute. However, on April 19th, 1977 the District Attorney was notified by the doctor that this defendant was fit to stand trial. Then on April 20th, he plead guilty before me.

The defendant admits to taking part in the robberies. He complains of being depressed because of his separation from his wife. He denies hurting anyone. According to the statement he has never made any overture to hurting anyone.

The defendant's present robbery conviction which involves three armed robberies in a seven count indictment which involves attempted murder of a Police Officer, and forgery among other charges. It's typical of his criminal record.

As a juvenile he has had numerous opportunities to rehabilitate himself and he has been granted probation. He was granted probation as a juvenile and as an adult he had a probation. He has had probation as a juvenile on two occasions and in the Supreme Court on one occasion. He

has apparently had approximately five probation sentences. Now, this defendant has had without any question a psychiatric history. He has committed acts as early as the age of twelve. He was at one time committed to Rockland State Hospital as a child. He was additionally held for observations in Bellevue before coming into contact with the law as a juvenile.

It's my feeling that this defendant has a mental problem but the community must be protected against a defendant who has demonstrated as far as the facts are concerned a dangerous person and I am in sentencing this defendant making a specific recommendation (that an) effort should be made to see to it that this defendant receives psychiatric care. In my opinion it is essential because after this defendant is discharged and someday he will be discharged, we must make every effort to see that he is not discharged in the same mental manner in which he goes in.

I repeat this sentence is to cover all matters outstanding against this defendant except for any A Felonies, which I understand there are none. The defendant is sentenced to an indeterminate sentence, the maximum of which shall be 18 years and the minimum shall be nine years.

Ms. Lyles: Your Honor, may I be heard. At the time that this sentence was entered into a recommendation was made that this was to run consecutively to any parole time.

The Court: If there is any parole time outstanding on this defendant it will run consecutively to it.

The Clerk: Norman Silverstein, you have a right to appeal this conviction. A notice of appeal must be filed within 30 days.

The Court: The Counsel indicates that he doesn't owe any parole time. If such parole time is owed it is to be

consecutive. This will run concurrent with any probation violations, however.

This is to certify that the foregoing is a true and accurate copy.

/s/ Albert R. Monaco

Albert R. Monaco
Court Reporter

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FILED
AUG 26 1983
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

ROBERT HENDERSON,

Petitioner,

-v-

NORMAN SILVERSTEIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Attorney for Respondent

10

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

ROBERT HENDERSON,

Petitioner,

-v-

NORMAN SILVERSTEIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Norman Silverstein submits this brief in opposition to petitioner's application for a writ of certiorari.

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STATEMENT OF THE CASE

A. The Trial Court Proceedings

Respondent Silverstein is retarded and illiterate. He has an I.Q. of 74 and the mental age of a seven-year-old. He has not developed intellectually beyond the second grade level. He has a long institutional history, having been committed to Rockland State Hospital three times and held for observation at least once at Bellevue and Mid-Hudson State Hospitals. He has been diagnosed as possibly schizophrenic.*

On April 20, 1976, respondent was indicted for robbery and possession of a weapon (Indictment #994/76).** On March 22, 1977, the judge of the Bronx Supreme Court before whom respondent was appearing on the first indictment ordered that he be examined pursuant to Article 730 of the Criminal Procedure Law of the State of New York to determine whether he was competent to stand trial. After that examination had taken place, both of the psychiatrists appointed by the court reported that respondent was incompetent to stand trial. Based on these findings, the court on April 12, 1977 ordered that respondent be committed to an appropriate mental institution, saying:

> THE COURT: For the record, this report has been received by the Court pursuant to 730 of the C.P.L., Article 730 and the finding by two psychiatrists is that the defendant, that his judgment and intelligence are sufficiently impaired to the extent that he cannot assist in his own defense and he is unfit to proceed. Under those circumstances, the motion to confirm the report is granted and the

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* Silverstein v. Henderson, Slip Op. at 3103. (Petitioner included the Second Circuit's decision in this case as Appendix A to his petition for a writ of certiorari. Because of the large number of omissions and typographical errors in that appendix, however, a copy of the court's slip opinion is attached as Appendix A to this response. References are to the pages of the slip opinion.

** Later, respondent was also indicted for forgery and related crimes (Indictment #475/77).

> defendant, Norman Silverstein, having been examined pursuant to Court Order by two psychiatric examiners, the Court having examined such examination report, a copy of which will be attached to this order, it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him or to assist in his defense.
>
> I therefore order that the defendant is to be continued in detention and referred to--he will be in Bellevue Hospital until such time as the Department of Mental Hygiene sends him to the appropriate institution. All right, so ordered.
>
> Transcript of April 12, 1977 at 3-4.*

One week later, however, Mid-Hudson Psychiatric Center informed the prosecutor that a psychiatrist there had conducted another examination of respondent (which allegedly lasted only fifteen minutes) and had concluded on the basis of that interview that respondent was competent to stand trial. Despite the conflict between the findings of this psychiatrist and the findings of the two psychiatrists who had examined respondent just a few days earlier, neither the court nor respondent's counsel suggested that a hearing be held, as required by N.Y. Crim. Proc. Law §730.30(4), to determine which conclusion was correct. Rather, they simply proceeded immediately to plead respondent guilty to robbery in the first degree (29a).**

The colloquy between respondent and the court during the taking if that plea established that respondent in fact was not guilty of that crime. New York State Penal Law §160.15 states that it is an affirmative defense to robbery in the first

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* Although petitioner included the transcripts of all of the other state court proceedings in his appendix, he omitted this transcript. It is therefore set forth as Appendix B to this response.

** References followed by "a" are to the pages of petitioner's appendix.

degree that the weapon the perpetrator was carrying was not loaded. It was brought out during the plea colloquy, however, that respondent was armed only with a toy gun (32a). At no time did the court or defense counsel attempt to explain to respondent that the fact that the gun was a toy constituted a complete defense to this particular charge. Rather, the court simply accepted the guilty plea, ordered a pre-sentence report, and scheduled sentencing for June 21, 1977.

The pre-sentence report once again called the court's attention to respondent's extensive history of psychiatric problems. Thus, the report stated that respondent is very limited intellectually, with an I.Q. of about 74, that he is considered retarded, that he has been diagnosed as having a severe personality disturbance with possible underlying schizophrenia, that he had a history of repeated hospitalizations at Rockland State, Bellevue and Mid-Hudson, and that he is illiterate and at about the second grade level intellectually.

At the sentencing proceeding on June 21, 1977, the court again indicated its awareness of respondent's serious psychiatric problems, stating:

> [The Defendant] was declared incompetent to stand trial and committed to the Mid-Hudson Institute. However, on April 19th, 1977, the District Attorney was notified by the doctor that this defendant was fit to stand trial. Then on April 20th, he pled guilty before me . . .
>
> . . . Now, this defendant has had without any question a psychiatric history. He has committed acts as early as the age twelve. He was at one time committed to Rockland State Hospital as a child. He was additionally held for observations in Bellevue before coming into contact with the law as a juvenile.
>
> It's my feeling that this defendant has a mental problem but the community must be protected against a defendant who has demonstrated, as far as the facts are concerned, a dangerous person and I am, in sentencing this defendant,

> making a specific recommendation effort should be made to see to it that this defendant receives psychiatric care. In my opinion it is essential because after this defendant is discharged and someday he will be discharged, we must make every effort to see that he is not discharged in the same mental manner in which he goes in.
>
> (42a-43a)

The court then sentenced respondent to an indeterminate term with a maximum of eighteen years and a minimum of nine years.

B. The Direct Appeal

The psychiatric report finding respondent incompetent to stand trial was never made a part of the record in respondent's direct appeal. Consequently, respondent's assigned appellate counsel, who had not represented him at trial, was never made aware of the conflicting psychiatric opinions concerning respondent's competence. In respondent's direct appeal, therefore, his counsel argued only that respondent's sentence was excessive. The Appellate Division, First Department, affirmed without opinion, People v. Silverstein, 65 A.D.2d 679 (1st Dept. 1978). Leave to appeal to the New York Court of Appeals was denied on November 28, 1978.

C. The First Coram Nobis Petition

A fellow inmate thereafter filed a pro se motion for respondent pursuant to New York Penal Law §440.10 on September 11, 1980, arguing inter alia that his federal constitutional rights had been violated by the ineffective assistance of his trial counsel, particularly because of counsel's failure to request a competency hearing, the improper allocution of the guilty plea, and respondent's unknowing waiver, by pleading guilty, of his constitutional rights. The trial court denied this motion with the following endorsement:

> Upon the foregoing papers this pro se motion is denied. The issues presented by the defendant have already been determined by the Appellate Division (see People v. Silverstein, 65 A.D.2d 679).

Respondent's application for leave to appeal this decision to the Appellate Division, First Department, was denied on December 11, 1980 by Justice Sullivan of that court.

D. The Second Coram Nobis Petition

In January, 1981, the fellow inmate filed a second coram nobis proceeding alleging that respondent's federal constitutional rights had been violated in that, at the time of the lower court proceedings, he was suffering from a mental disease of such degree as to render him incapable of understanding those proceedings, and that he had been denied effective assistance of counsel both in the trial court and on appeal. The trial court likewise denied this motion on the ground that the issues had already been decided by the Appellate Division during the direct appeal (37a-38a). Application for leave to appeal to the Appellate Division was denied on March 12, 1981 (Carro, J.).

E. The Federal Habeas Corpus Proceedings

On January 8, 1981, respondent's inmate friend filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, arguing inter alia that respondent's federal constitutional rights had been violated: 1) by the fact that he was incompetent when he pleaded guilty and was not afforded a competency hearing; 2) by the improper allocution of his plea; 3) by the ineffective assistance of his trial and appellate counsel; and 4) by his unknowing waiver of his constitutional rights in pleading guilty.

The district court held that all of these issues had been exhausted in the state courts (20a).*

The court then examined the state court's stated reason for denying respondent's coram nobis petitions on these issues — that the issues had already been decided adversely to respondent on his direct appeal — and concluded that this finding was erroneous (21a fn). The district court then held that the state court had really denied the incompetency issues raised in respondent's coram nobis applications for the opposite reasons — because he had failed to raise the issues contained therein on his direct appeal. This, the district court held, constituted a state procedural default barring respondent from raising these issues in a habeas proceeding in the federal courts (22a-24a).

The United States Court of Appeals for the Second Circuit reversed the district court, finding that the state courts had not, would not and constitutionally could not have found that respondent had committed a procedural default (Appendix B, Slip Op. at 3108-3116). The Court then went on to address the merits of respondent's claim, holding that in the face of the extensive evidence before the trial court indicating that respondent was incompetent to plead or stand trial, that court had violated respondent's constitutional rights by accepting his guilty plea without first conducting a hearing to determine whether he was competent (id., Slip Op. at 3116-3118). Consequently, the Court ordered that the writ of habeas corpus issue unless respondent was brought to trial within a reasonable time.

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* Respondent also argued that misrepresentations in his pre-sentence report had violated his constitutional rights. Respondent conceded, however, that he had not raised this issue as a federal constitutional claim in the state courts, and therefore subsequently agreed to delete any reference to this claim from his petition (9a).

REASONS FOR DENYING THE WRIT

A. THE SECOND CIRCUIT'S DECISION ON THE MERITS OF RESPONDENT'S CLAIM — THAT SINCE THE TRIAL COURT WAS PRESENTED WITH CONSIDERABLE EVIDENCE CREATING A SUBSTANTIAL DOUBT AS TO THE RESPONDENT'S COMPETENCE TO STAND TRIAL, IT WAS CONSTITUTIONALLY OBLIGED TO HOLD A HEARING TO DETERMINE WHETHER HE WAS COMPETENT — IS CONSISTENT WITH, AND COMPELLED BY, THE PRIOR DECISIONS OF THIS COURT.

Two of the three psychiatrists who examined respondent reported to the court that he was incompetent to understand the proceedings or stand trial. Nevertheless, the trial court, without conducting any hearing to determine whether respondent was competent, simply certified him so and proceeded to accept his plea of guilty to robbery in the first degree. The colloquy on that plea established that respondent in fact was not guilty of that crime and that he was pleading guilty without a clear understanding of the relationship between the facts and the law, or the constitutional rights he was waiving.

One of the most fundamental tenets of due process in our adversary system of justice is that a defendant whose "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense" may not be subjected to a criminal trial. Drope v. Missouri, 420 U.S. 162, 171-72 (1975). Such a prohibition is particularly appropriate in the case of a guilty plea, where the defendant is expected intelligently to waive inter alia his consitutional rights to trial by jury and to compulsory process, as well as his privilege against self-incrimination and his right to be acquitted unless the prosecution can prove beyond a reasonable doubt that he is guilty of the crimes charged. A waiver of such fundamental rights is valid only if it constitutes "an intentional relinquishment

or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As this Court said in McCarthy v. United States, 394 U.S. 459, 466 (1966), if a guilty plea is not "equally voluntary and knowing, it has been obtained in violation of due process and is therefore void".*

Since the Constitution required that respondent make a voluntary and knowing decision to waive these rights before he could properly plead guilty, it also required that he be competent to do so. Pate v. Robinson, 383 U.S. 375 (1966):

> Pate v. Robinson, supra, and McCarthy v. United States, supra, teach us that a guilty plea made while a defendant is incompetent violates due process and is therefore void. It logically follows that any Boykin [v. Alabama, 395 U.S. 283 (1969)] discussion occurring while a defendant is incompetent is also a nullity.
>
> United States ex rel. Suggs v. LaVallee, 570 F.2d 1092, 1116 (2d Cir.), cert. denied, 439 U.S. 915 (1978).

In the present case, ample evidence existed that respondent was not competent at the time he pleaded guilty. Two of the three psychiatrists who had examined him just prior to his plea proceeding concluded that he was not competent. In fact, on the basis of their reports, the trial judge initially ruled that respondent was incompetent and committed him to the custody of the Department of Mental Hygiene. He summarized the psychiatrists' findings thus:

> THE COURT: For the record, this report has been received by the Court pursuant to 730 of the C.P.L., Article 730 and the finding by two psychiatrists is that the defendant,

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* The requirement of knowing waiver in guilty pleas is so fundamental that some courts have held that even greater competence must be established to enable a defendant to plead guilty than would be required to enable him to go to trial. See, e.g., Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973). This conclusion was based on this Court's decision in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) (per curiam), which recognized a distinction between competence to stand trial and competence to waive the right to counsel, the former not necessarily guaranteeing the latter.

> that his judgment and intelligence are sufficiently impaired to the extent that he cannot assist in his own defense and he is unfit to proceed. Under those circumstances, the motion to confirm the report is granted and the defendant, Norman Silverstein, having been examined pursuant to Court Order by two psychiatric examiners, the Court having examined such examination report, a copy of which will be attached to this order, it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him to to assist in his defense.
>
> I therefore order that the defendant is to be continued in detention and referred to —he will be in Bellevue Hospital until such time as the Department of Mental Hygiene sends him to the appropriate institution. All right, so ordered.

One month later, however, citing the report of a third psychiatrist who found respondent competent, based on a single fifteen minute interview conducted just a few days after the other two psychiatrists had found him incompetent, the trial judge, without conducting any hearing to determine which conclusion was correct, simply reversed his finding, declared respondent competent, and proceeded immediately to accept his guilty plea.

The pre-sentence report likewise raised significant doubts as to respondent's competence, describing as it did his extensive history of psychiatric problems. Even at sentencing, the judge acknowledged that respondent had serious mental problems:

> . . . Now, this defendant has had without any question a psychiatric history. He has committed acts as early as the age twelve. He was at one time committed to Rockland State Hospital as a child. He was additionally held for observations in Bellevue before coming into contact with the law as a juvenile.
>
> It's my feeling that this defendant has a mental problem . . . I am, in sentencing this defendant, making a specific recommendation effort should be made to see to it that this defendant receives psychiatric care. In my opinion it is essential because after this defendant is discharged and someday he will be discharged, we must make every effort to see that he is not discharged in the same mental manner in which he goes in.

Given this extensive evidence that respondent was incopetent, the trial judge was mandated by constitutional due process requirements to hold a hearing. As this Court said in Pate v. Robinson, supra, 383 U.S. at 385-86:

> [If] circumstances generate a substantial doubt as to the accused's competence . . . a suitable hearing must be held.

See also Pate v. Smith, 637 F.2d 1068, 1071 (6th Cir. 1981); Hampton v. Tinsley, 240 F.Supp. 213 (D.Colo. 1965).

Such a hearing is also required by New York State Law. Section 730.30(3) of the New York Criminal Procedure Law clearly states:

> When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or when the examination reports submitted to the superior court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.

The Constitution mandates such a hearing whenever "circumstances generate a substantial doubt as to the accused's competence". Pate v. Robinson, supra, 383 U.S. at 385-86. Such circumstances indisputably existed in the present case. Respondent's long history of psychiatric illness, his numerous commitments to mental institutions, the comments in the pre-sentence report, and the reports of two of the three psychiatrists who examined him all raised much more than a "substantial doubt" as to his competence. Given these circumstances, the trial court's failure to conduct a hearing to determine whether respondent was competent constituted a serious violation of respondent's constitutional rights. The Second Circuit was therefore correct in ordering that a writ of habeas corpus be issued unless petitioner corrected this constitutional violation by bringing respondent to trial within a reasonable period.

B. THE SECOND CIRCUIT'S PROCEDURAL FINDING — THAT RESPONDENT WAS NOT PROCEDURALLY BARRED FROM RAISING THE ISSUE OF HIS CONSTITUTIONAL RIGHT TO A COMPETENCY HEARING IN THE FEDERAL COURTS — IS ALSO COMPELLED BY THIS COURT'S PRIOR DECISIONS.

Despite this clear violation of respondent's most fundamental constitutional rights, petitioner nevertheless insists that respondent should be barred from federal habeas corpus relief because he failed to raise his claim in the state court in a particular procedural fashion.

Respondent filed two coram nobis petitions, each raising inter alia the argument that his constitutional rights had been violated by the trial court's failure to hold a competency hearing. He thus gave the state courts a first fair opportunity to pass on his constitutional claim. Picard v. Connor, 404 U.S. 270 (1971).

Petitioner claims, however, that because this potentially incompetent individual failed to raise his claim earlier — at trial or on direct appeal — he is forever barred by state procedural default from obtaining a determination of whether he was competent at the time he pleaded guilty.

The simple answer to the petitioner's contention is that a defendant whose competency is in doubt cannot be found to have lost through procedural default the right to a hearing on that issue. As this Court said in Pate v. Robinson, supra, 383 U.S. at 384:

> The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. See, Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960).

See also Bishop v. United States, 223 F.2d 582 (D.C.Cir. 1955), rev'd. 350 U.S. 961 (1956) (this Court reversed and remanded for

a competency hearing a case in which the Court of Appeals held that the right to such a hearing had been waived); Smith v. United States, 267 F.2d 210 (9th Cir. 1959); Taylor v. United States, 282 F.2d 16 (8th Cir. 1960).

Nor does the fact that respondent was represented by counsel who failed to demand such a hearing alter the conclusion reached in Pate. Pate's lawyer likewise failed to make such a demand; nevertheless, this Court held that the defendant was entitled to federal habeas corpus relief. As the Second Circuit said in United States ex rel. Codarre v. Gilligan, 363 F.2d 961, 964-65 (2d Cir. 1966):

> On this appeal we are not concerned with the substantive situation at the time the crime was committed, but rather with appellant's capacity at the time of the trial and of the plea of guilty. The issue with which we are faced is whether [an allegedly incompetent defendant] made a reasoned choice, "voluntarily after proper advice and with full understanding of the consequences", when he entered his plea of guilty. Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927); see Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); United States ex rel. McGrath v. LaVallee, 348 F.2d 373, 376 (2d Cir. 1965). Where a guilty plea is not based upon a reasoned choice, the resulting conviction is open to collateral attack. See Machibroda v. United States, supra; Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942); United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 311 (2d Cir. 1963).
>
> * * *
>
> Since the record does not establish that in pleading guilty this [allegedly incompetent defendant] was exercising a reasoned choice, we find a denial of due process in New York's failure to provide adequate protective procedure.
>
> The fact that [the defendant] had court-appointed counsel who recommended pleading guilty is not conclusive. [The defenant] himself must have made a reasoned choice. See Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (April 19, 1966); Kotz v. United States

353 F.2d 312, 314 (8th Cir. 1965); cf. Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Whitus v. Balkcom, 333 F.2d 496, 502-503 (5th Cir.), cert. denied, 379 U.S. 931, 85 S.Ct. 327, 13 L.Ed.2d 343 (1964). In Brookhart v. Janis, supra, 384 U.S. at 6, 86 S.Ct. at 1248, the Supreme Court held that the "constitutional rights of a defendant cannot be waived by his counsel" where "petitioner [himself] did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea".

Consequently, respondent's right to a proper determination of his competency cannot be said to have been waived by procedural default.

Even the state courts did not find that respondent was barred by procedural default from raising this issue. Rather, the state court said that the issue had already been raised and decided on its merits by the state appellate courts. If that was true, then state remedies on this issue have been exhausted and respondent was entitled to raise the issue in the federal courts. See, e.g., Picard v. Connor, 404 U.S. 270, 276 (1971).

Even if the state court was wrong and the issue was not raised in respondent's direct appeal, however, the procedural default doctrine is still not controlling. Wainwright v. Sykes, 433 U.S. 72 (1977), the case in which this Court articulated that doctrine is, by its own language, applicable only in those instances where the state courts denied the petitioner's application on "independent and adequate" state procedural grounds. Id., 433 U.S. at 87. If the state court's ground for denying a petition was in fact erroneous, then it does not constitute an "adequate" ground, and the prohibition of Wainwright does not apply.

Moreover, Wainwright is applicable only if the state court itself based its conclusion on a specific finding of procedural default. There is no basis in this record for believing that the state court would have accepted the claim of procedural default which petitioner now advances. Indeed, the state court ignored that ground in favor of a diametrically opposite finding when it

was proffered by the petitioners in their papers in opposition to respondent's coram nobis petitions. The state court, confronted with such an argument, could well have concluded under constraint of Pate v. Robinson, supra, that a finding of waiver was inappropriate in such circumstances.

Even if Wainwright is applicable, however, petitioner is still wrong in claiming that state procedural default bars consideration of the merits of respondent's claim. According to Wainwright, even a defendant whose constitutional claims were denied in the state courts on the basis of state procedural default is entitled to have the merits of his constitutional claim determined by the federal courts if he can show "cause and prejudice" for that default. As this Court explained in Wainwright, that qualification is designed to prevent "miscarriage of justice" (id., 433 U.S. at 91).

The instant case presents at least four different "causes" for any procedural default which respondent may be said to have committed in pursuing his right to a competency hearing. Separately or jointly, these causes more than satisfy the first prong of the Wainwright test:

1) Respondent's Incompetence - As previously explained, the basis of respondent's claim is that he was incompetent to stand trial or plead guilty. It therefore necessarily follows that he was also incompetent to comply with the state procedural requirements on which he is now acc used of defaulting. His incompetence thus provides sufficient "cause" to excuse any such default. Pate v. Robinson, supra.

2) Ineffective Assistance of Counsel - Respondent argued in the state and federal courts that his trial and appellate counsel had been ineffective in failing to preserve this and other issues in his behalf. Respondent submits that the failures of his state counsel constituted a violation of his Sixth and Fourteenth

Amendment rights. Whether or not counsels' overall conduct rose to that level, however, their failure, despite extensive evidence of respondent's incompetence, to follow the procedures necessary to preserve his fundamental right to a competency hearing establishes that they were sufficiently ineffective to satisfy the "cause" requirement of Wainwright. Thus, numerous courts and commentators have cited ineffective assistance of counsel as one of the most common justifications for excusing a procedural default under Wainwright. See, e.g., United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1977); LiPuma v. Commissioner, 560 F.2d 84 (2d Cir. 1977); Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum.L.Rev. 1050, 1076.

3) Respondent's constitutional claim impugns the integrity of the process for distinguishing guilt from innocence. The conclusion that respondent was guilty of the crime to which he was pleading, as well as the subsequent judgment of conviction and sentence, were based entirely on respondent's own statements at the plea proceeding. If in fact respondent was incompetent at the time he made those statements, they do not provide a reliable basis for the judgment in this case. The fact that respondent's constitutional claim thus impugns the integrity of the process by which he was convicted and incarcerated is yet another "cause" why any procedural default should be excused. See, e.g., Brown v. Mississippi, 297 U.S. 278, 286-87(1936) (Court rejected state's argument that appellant had waived his right to challenge the admissibility of a coerced confession by failing to raise such an objection at trial); United States v. Wade, 388 U.S. 218 (1967); Sheppard v. Maxwell, 384 U.S. 333 (1966); Berries v. Egeler, 583 F.2d 515, 522 (6th Cir. 1978); The Forfeiture of Constitutional Rights in Criminal Cases, supra, at 1076.

4) Respondent has made a "colorable showing of innocence" of the crime to which he pleaded guilty. As previously

explained, the "cause and prejudice" test of Wainwright was designed to prevent miscarriage of justice, in particular the conviction of persons who are not in fact guilty of the crime charged. In this case, the plea proceeding establishes that respondent had a complete affirmative defense to the charge of first degree robbery because he was armed only with a toy gun. Nevertheless, he pleaded guilty to that crime and is now incarcerated serving the sentence imposed on the basis of that plea. The fact that he is apparently not guilty of that crime is yet another "cause" for excusing any default. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi.L.Rev. 142, 160 (1970); The Forfeiture of Constitutional Rights in Criminal Cases, supra, at 1076-77.

The last "cause" factor also provides the "prejudice" required by the second prong of the Wainwright test. Respondent is not guilty of the crime for which he is presently incarcerated. Indeed, he may not be guilty of any crime, either because his incompetence left him without the requisite intent, or because he did not commit the acts at all but rather, as a result of his incompetence, was induced to plead guilty by the coersive nature of proceedings which he could not fully grasp.*

Whatever the case, the record in this proceeding clearly establishes that at the time respondent pleaded guilty, the trial court was in possession of considerable authoritative evidence indicating that respondent was incompetent. In the face of that evidence, the trial court's failure to hold a hearing to determine whether respondent was in fact competent before accepting his plea constituted a serious violation of respondent's constitutional

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* It has been suggested that the retarded individual may confess guilt to gain approval from others. See Col. Human Rights L. Rev. 239, 254 (1972); Floyd, The Mentally Retarded Public Offender and the Law, p. 18 (1968); President's Committee on Mental Retardation, Report of the Task Force on Law, p. 33 (1963); Commonwealth v. Daniels, 321 N.E.2d 822, 827 (Mass. 1975).

rights. The procedural roadblock now being cited by the petitioner to forever bar respondent from receiving such a hearing must not be permitted to frustrate this individual's fundamental rights. The Second Circuit properly ordered that the writ of habeas corpus should issue, and the state should be ordered to release respondent unless it promptly affords him the competency hearing or trial to which he has long been constitutionally entitled.

C. THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THE NINTH CIRCUIT AS TO THE TEST TO BE APPLIED TO DETERMINE WHEN DUE PROCESS REQUIRES THAT A COURT CONDUCT A HEARING TO DETERMINE WHETHER A DEFENDANT IS COMPETENT.

The principal reason which petitioner gives for requesting a writ of certiorari is his contention that the Second Circuit is supposedly in conflict with the Ninth Circuit on the question of what circumstances will oblige a court, sua sponte if necessary, to conduct a hearing into the question of whether a defendant is competent to stand trial or plead guilty. The decisions of both Circuits clearly establish, however, that there is no conflict. Rather, both Circuits agree that the test to be applied is the one set forth by this Court in Drope v. Missouri, supra, and Pate v. Robinson, supra — namely, that if circumstances generate a substantial doubt as to the accused's competence, a suitable hearing must be held. Thus, in DeKaplany v. Enomoto, 540 F.2d 975, 980-81 (9th Cir. 1976), one of the cases cited by petitioner, the Ninth Circuit stated that a hearing is required sua sponte whenever there exists "substantial evidence" that the defendant may be mentally incompetent and that "evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial". Likewise, in United States v. Clark, 617 F.2d 180, 185 (9th Cir. 1980), another of the cases cited by petitioner, the Ninth Circuit stated that "Drope held that a trial court has a continuing duty to insure that a defendant is not subjected to trial if his "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . . ."

It is therefore clear that the conflict which petitioner alleges is in reality not a conflict at all but rather simply an example of the differing results which necessarily occur when this

agreed-upon test is applied to different factual circumstances. Indeed, the Ninth Circuit said as much in United States v. Clark, supra, 617 F.2d at 184, when it noted that the question of whether a "hearing is required depends upon the evidence in each case, under the principles in Part II, infra (referring to the test quoted above)".

In the present case, the record before the trial judge — including the fact that respondent was retarded, his long history of institutionalization, and the fact that two of the three psychiatrists who had examined him within a few days of one another shortly before the plea proceedings had concluded that he was incompetent — was more than sufficient to generate a reasonable doubt as to his competence. Given that evidence, the trial court's failure to conduct a hearing as to respondent's competency constituted a clear violation of his constitutional rights. In contrast, the cases cited by petitioner contained facts which were considerably less compelling. In fact, the Second Circuit discussed one of those cases in a footnote to its opinion in this case as an example of how different circumstances could lead to a different result:

> The Ninth Circuit reached a different conclusion in a case where the third psychiatric report finding the defendant competent to stand trial was based on interviews conducted five months after two psychiatrists had found the defendant incompetent. United States v. Caplan, 633 F.2d 534, 539-42 (9th Cir. 1980). The defendant's status had apparently improved under interim psychiatric treatment. Because there was no other specific evidence of the defendant's alleged incompetence, the court of appeals held that it had not been an abuse of discretion not to conduct a competency hearing upon receipt of the third report.
>
> Silverstein v. Henderson, supra, Slip Op. at 3117, fn. 15.

Here, to the contrary, there was no "interim psychiatric treatment". Rather, the third psychiatrist evaluated respondent just a few days after the first two psychiatrists had found him incompetent.

The principal problem with petitioner's arguments is that they all assume that the petitioner was competent. Thus, at one point, petitioner argues that the Second Circuit's decision "effectively vitiates a defendant's right to constitutionally waive possible defenses if he or she is able to make a reasoned choice among the alternatives presented and able to understand the nature and consequences of the waiver" (Petition at 11) (emphasis added). At another point, petitioner insists that the Second Circuit's decision subjects a defendant "to an unwanted hearing which fetters [the defendant's] reasoned choice [of whether to plead guilty]" (Petition at 12) (emphasis added). The principal goal of the Second Circuit's decision in this case, however, and indeed the principal goal of this Court's decisions in Pate and Drope, is to insure before a defendant waives any of his rights (i.e., by pleading guilty), that he is competent to make a "reasoned choice" and to "understand the nature and consequences of the waiver". Both the Second and Ninth Circuits agree that where, as here, the circumstances create a substantial doubt as to the defendant's competence, such doubts must be resolved at an appropriate hearing. Since no such hearing was held in this case, respondent's guilty plea is invalid and was properly set aside by the Second Circuit.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 535—August Term, 1982

Argued: December 2, 1982 Decided: April 12, 1983

Docket No. 82-2028

NORMAN SILVERSTEIN,

Petitioner-Appellant,

—against—

ROBERT HENDERSON,

Respondent-Appellee.

Before:

LUMBARD, MANSFIELD and KEARSE,
Circuit Judges.

Norman Silverstein appeals from a January 6, 1982, decision of the District Court for the Southern District of New York (Stewart, *J.*) dismissing his petition for a writ of habeas corpus. After refusing to consider an unrelated, unexhausted claim, the district court held that federal

Appendix A

consideration of the claim that Silverstein had been incompetent to stand trial was barred by the state court's finding of procedural default for failure to raise the competence issue on direct review of his conviction.

Reversed and remanded with orders to issue the writ.

MICHAEL YOUNG, ESQ., New York, N.Y., for Petitioner-Appellant.

GEORGE C. PERRY, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Gerald J. Ryan, Assistant Attorney General, New York, N.Y., of counsel) for Respondent-Appellee.

LUMBARD, *Circuit Judge*:

Norman Silverstein appeals from a January 6, 1982, order of Judge Stewart in the Southern District of New York dismissing his petition for a writ of habeas corpus. Silverstein is imprisoned in the New York State correction facility at Auburn, serving a nine-to-eighteen year sentence for armed robbery. The heart of his claim is that he was incompetent to stand trial and that his guilty plea was thus constitutionally void. The district court held, however, that relief on this claim was barred because Silverstein had neglected to raise the issue on his direct appeal. We reverse and direct that the writ be issued.

I.

Silverstein is, allegedly, retarded and illiterate. He has an I.Q. of 74 and, according to one of his doctors, the mental age of a seven-year-old. He has not developed intellectually beyond the second grade level. He has a long institutional history, having been committed to Rockland State Hospital three times and held for observation at least once at Bellevue and Mid-Hudson State Hospitals. He has been diagnosed as possibly schizophrenic.[1]

In 1976, Silverstein was arrested and indicted in Bronx County on several charges growing out of three "gunpoint" robberies allegedly committed with an accomplice. He was released on bail, defaulted and was arrested again on March 4, 1977.

One month later, about April 6, 1977, pursuant to court order, Silverstein was examined by two psychiatrists. Both agreed he was incompetent to stand trial. On April 12th Justice Goldfluss, of the New York Supreme Court in Bronx County, accepted the psychiatrists' report. The court stated for the record, "having examined such. . . . report, . . . it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him or to assist in his defense." Accordingly, the court ordered Silverstein detained at Bellevue, pending transfer by the State Department of Mental Hygiene.

One week later, on April 19th, the Mid-Hudson Psychiatric Center informed the Bronx County district attorney

[1] Because no hearing into Silverstein's competence has ever been held, the facts concerning Silverstein's competence have never been established. These allegations, the precise details of which we do not rely on in reaching our decision, are, in any event, not controverted by the state on this appeal.

that a third psychiatrist had found Silverstein competent to stand trial, allegedly on the basis of one fifteen-minute interview. In proceedings on May 20th, Justice Goldfluss accepted this third psychiatric report. A few moments later, per an agreement with the Bronx County district attorney, Silverstein pled guilty to one count of robbery in the first degree, armed robbery, under N.Y. Penal Law § 160.15(2) (McKinney 1975). All remaining charges were dropped. Neither the court nor Silverstein's counsel suggested that the disagreement between the three psychiatrists be resolved at a hearing, as required by N.Y. Crim. Proc. Law § 730.30(4) (McKinney, 1971).[2] Indeed, no hearing into Silverstein's competence to stand trial or to make a plea bargain was ever held.

The sentencing proceeding on June 21, 1977, again demonstrated Justice Goldfluss' knowledge that Silverstein "has had without question a psychiatric history," including a series of institutionalizations. The court expressed its "feeling that this defendant has a mental problem but the community must be protected against a defendant who [is] . . . a dangerous person and I am [,] in sentencing this defendant [,] making a specific recommendation . . . that [he] receive[ ] psychiatric care. In my opinion it is essential because . . . someday he will be discharged [and] we must make every effort to see that he is not discharged in the same mental manner in which he goes in." The court sentenced Silverstein to nine to eighteen years in prison.

[2] Section 730.30(4) requires a hearing on competence whenever the examining psychiatrists are not of unanimous opinion. Alternatively, on the theory that the two-week period between the examinations makes the second examination stand apart as an independent inquiry into defendant's state of mind, § 730.20 requires the court to seek the opinion of *two* psychiatrists. Thus, however the situation is viewed, Silverstein's competence was not determined in accordance with Article 730.

Silverstein appealed his conviction. The psychiatric report finding him incompetent to stand trial apparently did not become part of the record.[3] Appellate counsel, who had not represented the defendant at trial, was allegedly never made aware of the conflicting psychiatric opinion concerning Silverstein's competence. In any event, appellate counsel failed to urge incompetence as a ground for vacating the conviction. Counsel failed to argue that the trial court had not complied with the procedural requirements of § 730.30 for determining competence. Counsel appealed only on the ground that the sentence was excessive in light of the defendant's diminished mental capacity and his lack of intent to harm his victims. The Appellate Division affirmed without opinion, 65 A.D.2d 679 (1978), and leave to appeal to the Court of Appeals was denied (Nov. 28, 1978).

On September 20, 1980, Silverstein, acting *pro se*, commenced the series of proceedings that culminated in this appeal. He petitioned the New York Supreme Court, Bronx County, under N.Y. Crim. Proc. Law § 440.10 (McKinney 1971) to vacate his conviction. He argued,

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[3] The record establishes only that the third psychiatric report, finding Silverstein competent to stand trial, became part of the record on Silverstein's direct appeal to the New York Appellate Division. In its "Affirmation in Opposition" to Silverstein's collateral attack in state court on his conviction, the state argued that "with regard to the allegation that he was incompetent to stand trial, the lower court at the plea proceedings contained a psychiatric report finding defendant competent. Since this report was part of the record below and since defendant's appellate counsel received a copy of it . . . defendant could have pursued this issue on direct appeal." This argument implies that the first two reports finding Silverstein incompetent did not become part of the record on appeal and were not provided to Silverstein's appellate counsel. Since our resolution of this case makes it unnecessary to undertake the "cause and prejudice" analysis of *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), we find it unnecessary to remand for a hearing to determine why appellate counsel was never apprised of all the facts.

inter alia, that he had never been aware of his right to a hearing on competence.[4] In any event, he argued, "petitioner although an adult is no more than a seven year old child incapable of understanding" his constitutional rights. Thus, "petitioner[,] an illiterate with the mentality of a seven year old[,] waved [sic] no such rights and [neither] counsel nor court had any right to wave [sic] his rights."

The state argued in response that Silverstein's petition should be dismissed under § 440.10(2)(c), which requires denial of relief where the grounds for setting aside the conviction could have been raised on direct appeal but were not. The state argued specifically that because appellate counsel had been provided with a copy of the psychiatric report finding the defendant competent, counsel could have raised on appeal the question of defendant's competence to stand trial.[5]

Justice Goldfluss, who had first found defendant incompetent, then competent, and then accepted the guilty plea, also heard the § 440.10 motion to set aside the conviction. The court's one-sentence opinion dismissing the petition tacitly rejected the state's procedural default argument, resting the dismissal instead on the factually erroneous ground that "[t]he issues presented by the defendant have already been determined by the Appellate Division."

On December 29, 1980, Silverstein, again acting *pro se*, filed his second § 440.10 petition. Silverstein reiterated his claims that he had been incompetent to stand trial and

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4 Silverstein also argued (1) that the trial court had accepted his plea without determining whether he had committed all the elements of the crime and whether he understood all the rights he was waiving and (2) that he had received ineffective assistance of trial counsel.

5 *See supra* note 3.

that he had been denied his right to a proper determination of his competence under N.Y. Crim. Proc. Law art. 730 (McKinney 1971). Silverstein also complained that counsel had failed to follow his suggestions to contest on appeal his competence to stand trial.[6]

The state filed no opposing papers. Justice Goldfluss dismissed the petition on the ground that it contained "nothing new or novel that hasn't been brought to the attention of either this court or the Appellate Division." The court made explicit its earlier implicit holding that the defendant's mental capacity had been "clearly brought to the attention of the Appellate Division."

On January 8, 1981, Silverstein filed a *pro se* petition for a writ of habeas corpus in the District Court for the Southern District of New York. He subsequently retained counsel, who filed supporting papers. Silverstein claimed five grounds for relief: First, that the denial of a competency hearing and the acceptance of his guilty plea when he was incompetent to stand trial deprived him of due process; second, that the court improperly accepted his plea without determining whether he had committed all the elements of the crime; third, that he had been deprived of effective assistance of counsel on appeal and at trial; fourth, that by pleading guilty he had unknowingly waived his constitutional rights to confrontation, trial by jury, etc.; and fifth, that his sentence had been based upon misrepresentations in his presentence report.[7] The district court refused to consider the fifth claim, which

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6 In addition to the grounds alleged in the earlier petition, Silverstein also argued that he had been deprived of effective assistance of counsel on appeal and that his trial counsel had not informed him that he could testify before the grand jury in hopes of obtaining a "no bill."

7 Our resolution of the competence claim makes discussion of the remaining claims unnecessary.

had not been raised as a constitutional claim in state proceedings. The court found that the remaining four claims had been exhausted, and this finding is not disputed on appeal.

The state argued that *Wainwright v. Sykes*, 433 U.S. 72 (1977), bars the federal court from reaching the merits of these claims, because the state court had denied relief on an independent and adequate state procedural ground—Silverstein's failure to raise the issues on direct appeal. In addressing this argument, the district court noted that Justice Goldfluss' express reason for denying relief—that the issues had already been determined on direct appeal—was erroneous. To determine the state court's "precise *ratio decidendi*" for denying relief, the district court looked to the papers filed by the state in the first § 440.10 proceeding. As noted above, the state had argued that Silverstein was guilty of procedural default under N.Y. Crim. Proc. Law § 440.10(2)(c) in failing to raise the issues on direct appeal. On this basis, the district court concluded that the state court must have been "thinking along procedural lines," and that this procedural ruling barred federal consideration of Silverstein's claims.[8]

II.

Here too the state urges that we may not reach the merits, because this once *pro se* petitioner has not successfully wound his way through the labyrinthine procedural requirements surrounding federal habeas relief. We disagree.

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[8] Although the court held that the ineffective assistance of counsel claim based on failure to seek suppression of an involuntary confession was not barred by procedural default, it concluded that this claim was without merit.

The state argues, somewhat mysteriously, that the district court "blatantly ignored the Supreme Court's interdict" by "outright refus[ing] to adhere to the doctrine of *Rose [v. Lundy]*," 102 S. Ct. 1198 (1982), a case decided three months *after* the district court filed its decision. *Rose v. Lundy* requires the district courts to dismiss any habeas petition containing both exhausted and unexhausted claims; after such a dismissal, the petitioner would be free to strike from his papers all references to the unexhausted claims and to resubmit the petition to the federal court. However, following this Circuit's pre-*Rose* procedure, the district court simply refused to consider in any way the unexhausted claim, while going on to pass on the remaining grounds for relief.

We are confident that had *Rose* been the law, the district court would have required either the refiling of an amended petition or the substantial equivalent. However, because the state "failed" to raise the *Rose* issue before the district court,[9] the district court did not follow the precise dismissal litany. And thus the state now urges that we vacate the opinion below and remand the case so that the district court can formally dismiss the petition, Silverstein can then amend and refile his petition, the district court may then reconsider the amended petition and come to the same decision and send the case back to us.

We see no merit in this proposal. We hold that the *Rose* requirements were satisfied when the petitioner stated in

[9] We, of course, place no weight on the state's failure to raise the issue of the total exhaustion requirement in the district court. For the state executive branch may not ordinarily have the power to waive the deference due state courts. Nevertheless, we note that exhaustion is not jurisdictional; rather, it reflects more flexible principles of comity. *Darr v. Burford*, 339 U.S. 200, 203-11 (1950); *United States ex rel. Johnson v. Vincent*, 507 F.2d 1309, 1312 (2d Cir. 1974), *cert. denied*, 420 U.S. 994 (1975); *accord, Ballard v. Maggio*, 544 F.2d 1247, 1249 (5th Cir. 1977); *United States ex rel. Graham v. Mancusi*, 457 F.2d 463, 468 (2d Cir. 1982).

his brief, in oral argument, and in a letter to this court that he was withdrawing his unexhausted claim and all references to the elements of that claim in his briefs and in his habeas petition. *See Rock v. Coombe*, 694 F.2d 908 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3567 (U.S. Jan. 28, 1983); *Guthrie v. Warden*, 683 F.2d 820, 821 n.1 (4th Cir. 1982).

In *Rock v. Coombe, supra*, this court rejected a suggestion similar to the state's proposal where the district court, in a decision rendered after the Supreme Court decided *Rose*, had "ignored the dictates of *Rose v. Lundy* and dealt with the exhausted claims on the merits," *id.* at 914. In this situation, we permitted the petitioner to comply with *Rose* by withdrawing and abandoning his unexhausted claims at the appellate level. We saw "no reason to require the court to go through the jejune exercise of dismissing the petition and requiring that a new piece of paper be filed." *Id.* Any other result would have construed the petitioner's right to narrow his petition in order to submit only his exhausted claim "as a right encased in rigid formality." *Id.*

We believe that this appeal from a decision issued prior to *Rose* presents, if anything, an even stronger case for applying the total exhaustion rule by requiring the petitioner to withdraw his unexhausted claims at the appellate level.[10] Since Silverstein's exhausted and unexhausted

[10] We note that the Court of Appeals are apparently divided on the question of *Rose's* retroactive application. *Compare Bowen v. Tennessee*, 698 F.2d 241 (6th Cir. 1983) (en banc) (applying *Rose v. Lundy* retroactively and remanding to the district court with instructions to dismiss), *and Jones v. Hess*, 681 F.2d 688, 695 (10th Cir. 1982) (applying *Rose v. Lundy* retroactively to require dismissal where the unexhausted claims were "arguably intertwined" with the exhausted claims), *with Guthrie v. Warden*, 683 F.2d 820, 821 n.1 (4th Cir. 1982) (declining to give *Rose v. Lundy* rigid retroactive application where petitioner had abandoned his unexhausted claims early in the case and where petitioner would simply refile amended complaint if dismissed).

(footnote continued)

claims are plainly in no way intertwined, *see Rose, supra* at 1204, a more formal retroactive application of *Rose* would neither serve the purposes underlying the total exhaustion rule nor so "encourage state prisoners to seek full relief first from the state courts," *id.* at 1203, as to justify an otherwise pointless and burdensome exercise in paper shuffling.

III.

The State next argues that Silverstein's failure to challenge his competence on his direct appeal constitutes a waiver of his constitutional rights under N.Y. Crim. Proc. Law § 440.10(2)(c). The state court allegedly denied collateral relief after finding waiver under the statute, and, the argument goes, this finding constitutes an independent and adequate state ground immune from attack in a federal court. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Forman v. Smith*, 633 F.2d 634 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). We cannot agree. First, the New York courts could not constitutionally apply a procedural default rule to a possibly incompetent defendant. Second, the state's argument rests on an erroneous interpretation of New York criminal procedure. Finally, no New York court found Silverstein guilty of procedural default.

The Supreme Court's application of *Rose* to, and summary treatment of, three habeas cases pending on petition for certiorari when *Rose* was decided, *Bergman v. Burton*, 102 S. Ct. 2026 (1982); *Rodriquez v. Harris*, 102 S. Ct. 1627 (1982); *Duckworth v. Cowell*, 102 S. Ct. 1626 (1982), while not entirely illuminating, do not appear to indicate that a petitioner cannot effectively withdraw an unexhausted claim in order to avoid dismissal of the petition.

A.

In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court expressly denied that a habeas petitioner could have waived his right to a competency hearing by failing to request one at trial. *Id.* at 384. For "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.*; *see Suggs v. LaVallee*, 570 F.2d 1092, 1116-17 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978); *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972). Since the trial court in *Pate* had been alerted to the doubts as to the defendant's sanity, the Supreme Court rejected the claim that "no duty rested upon [the trial court] to order a hearing *sua sponte*." 383 U.S. at 378. Indeed, the trial court's failure to inquire into defendant's competence on its own motion "deprived [the petitioner] of his constitutional right to a fair trial." *Id.* at 385.

The question presented here is whether the waiver rule of *Wainwright v. Sykes*, *supra*, and *Forman v. Smith*, *supra*, applies to the right recognized by *Pate v. Robinson*. We conclude that it does not. *Wainwright* was premised on the defendant's violation of a constitutionally sound state procedural rule placing solely on the defendant the burden of contemporaneously objecting to the introduction of evidence. In contrast to *Pate*, *Wainwright* expressly rejected an argument that the Constitution both barred the state from applying such a rule and required the state to place the burden of objecting to the introduction of an involuntary confession on the trial court. *Wainwright*, *supra*, at 85-87. The Court held that under the Constitution the defendant merely had the right "at some stage in the proceedings *to object* to the use of

the confession and to have a fair hearing and a reliable determination on the issue of voluntariness." *Wainwright, supra,* at 86 (emphasis in original) (quoting *Jackson v. Denno, supra,* at 376-77.) As to such a right, the state was entitled to treat the failure to object as a waiver.

However, *Wainwright*'s waiver rule cannot apply when the basis for attacking the conviction is that the defendant is incompetent to stand trial, and thus incompetent to "waive" his rights. *Zapata v. Estelle,* 588 F.2d 1017, 1021 (5th Cir. 1979). Thus, when the trial court neglects its duty to conduct a hearing on competence, the defendant's failure to object or to take an appeal on the issue will not bar collateral attack. *Hayes v. United States,* 468 F. Supp. 179, 184 (S.D. Tex. 1979).

B.

We do not believe that the New York courts would reach a contrary result. For New York law provides the procedural protection *Pate* requires. The New York Court of Appeals has held that when the demeanor of the defendant or other evidence raises doubt as to his competence to stand trial, it is the trial court's duty to order a hearing *sua sponte. People v. Gonzalez,* 20 N.Y.2d 289, 293 (1967), *reaffirmed in People v. Armlin,* 37 N.Y.2d 167, 171 (1975); *see People v. Smyth,* 3 N.Y.2d 184, 187 (1957). And New York Criminal Procedure Law § 730.30(4) specifically requires the court to order a hearing on its own motion when, as here, the examining psychiatrists disagree on the defendant's competence. *See also People v. Bradt,* 77 A.D.2d 795 (1980) (error not to order hearing where reports finding defendant competent were conclusory and where evidence suggested incompetence); *People v. Candella,* 49 A.D.2d 800, 801 (1975) (same).

Thus, we are convinced that the New York courts would reject the argument that, by failing to raise the issue on direct appeal, Silverstein forfeited or waived his right to contest his competence to stand trial.[11] Indeed, citing *Pate v. Robinson*, the New York Court of Appeals has held that neither the failure to object at trial to inadequacies in the determination of competency nor the failure even to raise the issue at trial will bar the defendant from raising the issue for the first time on appeal. *People v. Armlin, supra*, at 170-72; *People v. Bangert*, 22 N.Y.2d 799, 800 (1968). Thus, if the trial court has been alerted to the defendant's mental problems and fails to order a hearing on competence, the conviction will be set aside on collateral review, even though the defendant failed to challenge his competence at trial, failed to request a competency hearing, and failed to appeal the issue. *People v. Freyre*, 76 Misc. 2d 210 (Sup. Ct. 1973).

C.

Finally, we believe that the state court denied collateral relief on the mistaken ground that the question of compe-

[11] Thus, even if our interpretation of Justice Goldfluss's ruling, *infra*, were incorrect and he had denied relief on the basis of a finding of procedural default, this finding would not be dispositive in a federal habeas proceeding. As noted above, *Wainwright* invoked the "well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Id.* at 81 (citations omitted). However, this immunity is not absolute, in either the substantive or the procedural context. For it is equally well established that a state may not, in an attempt to deprive a litigant of the right to a hearing on a federal claim, manipulate its findings of law, *see Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 379 (1813), (overruling Virginia Supreme Court finding of law that an inquest of office was not necessary to vest land in the Commonwealth), or fact, *see Summer v. Mata*, 449 U.S. 539, 548 (1981); *Maxwell v. Summer*, 673 F.2d 1031, 1035-36 (9th Cir.), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982). Thus, an unsupported or manipulative finding of procedural default would not constitute an adequate state ground barring federal habeas relief.

tence had already been fully litigated, rather than the ground that Silverstein had not appealed on the basis of his incompetence.[12] The state court's terse opinion in the first § 440 proceeding simply notes that all of the issues raised in Silverstein's petition "have already been determined by the Appellate Division." In ruling on the second § 440 proceeding, the state court was more explicit: As to the claim that the petitioner "was mentally incompetent at all times," Justice Goldfluss noted that the "underlying rationale in [Silverstein's direct appeal,] which was clearly brought to the attention of the Appellate Division, is that the defendant is retarded." Thus, "[t]here is nothing new or novel [in the petition] that hasn't been brought to the attention of . . . the Appellate Division. Consequently, the application and the motion made *pro se* is denied."

These remarks indicate that the state court denied Silverstein's motion to vacate his conviction under N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 1971), which requires the court to deny relief when "[t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment." Erroneous or not, this ruling does not constitute a finding of procedural default that would bar federal consideration of Silverstein's claims. *Maxwell v. Sumner*, 673 F.2d 1031, 1034 (9th Cir.) (*Wainwright v. Sykes* inapplicable when state denies habeas relief on ground that petitioner's arguments had been rejected on appeal), *cert. denied*, 103 S. Ct. 313 (1982).

In sum, under *Wainwright*, Silverstein's failure to allege on direct appeal that he was incompetent does not

[12] Because the evidence as to the state court's holding is entirely documentary, we are as competent to pass on this factual question as the district court. *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Jack Kahn Music v. Baldwin*, 604 F.2d 755, 758 (2d Cir. 1979).

bar federal habeas relief.[13] The New York courts did not, would not, and constitutionally could not find that Silverstein had waived his right to challenge his conviction on the ground that he was incompetent to stand trial.

IV.

We now turn to the merits of the petitioner's claim. We have held that the trial court must order a hearing when there is "reasonable ground" for believing that the defendant may be incompetent to stand trial. *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972).[14] Recognizing that there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," *Drope v. Missouri*, 420 U.S. 162, 180 (1975), we hold that in light of the undisputed facts, there were sufficient indicia of incompetence before the trial court to require a hearing. The state trial court had before it the reports of three psychiatrists. The mere fact that the last

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[13] Even if *Wainwright v. Sykes* were applicable, we believe that petitioner would be entitled to a hearing as to the "cause" for his failure to raise the issue of competence on direct appeal. *See supra* note 3.

We also believe that the defendant could show adequate "prejudice" under *Wainwright*. The acceptance of petitioner's plea in the absence of a hearing to establish competence establishes prejudice in that it so infected the process "that the resulting conviction violates due process." *United States v. Frady*, 102 S. Ct. 1584, 1595 (1982) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 146-47 (1973)). We believe that this "fundamental miscarriage of justice" meets the prejudice standard of *Wainwright v. Sykes*. *See United States v. Frady*, *supra*, at 1596; *Engle v. Isaacs*, 102 S. Ct. 1558, 1575 (1982).

[14] *See also Acosta v. Turner*, 666 F.2d 949, 954 (5th Cir. 1982) (requiring a hearing when there is a "bona fide doubt" as to competency); *United States v. Hayes*, 589 F.2d 811, 823 (5th Cir.) ("substantial" doubt), *cert. denied*, 444 U.S. 847 (1979).

of these reports found the petitioner competent to stand trial did not suffice to settle the question, given that two psychiatrists had submitted contrary reports just a few days before.[15] The doctors' disagreement gave the trial court reasonable grounds for doubting that Silverstein was competent to stand trial. Moreover, this doubt could only have been reinforced by the presentence report noting Silverstein's long institutional history and earlier diagnoses finding him retarded and possibly schizophrenic. *Saddler v. United States*, 531 F.2d 83, 86-87 (2d Cir. 1976). In these circumstances, the trial court's failure to order a hearing, *sua sponte* if necessary, violated the defendant's right to a fair trial. *Pate v. Robinson, supra*, at 385.

If the defendant were in fact incompetent at the time of trial, the acceptance of his plea would be void as a violation of due process. *Suggs v. Lavallee*, 570 F.2d 1092, 1116 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978). However, we doubt that a meaningful hearing on the question of the defendant's competence to stand trial at the time of his plea almost six years ago, on May 20, 1977 could be held at this late date. *See Drope v. Missouri, supra*, at 183 (adequate hearing not possible five years after conviction); *Pate v. Robinson, supra*, at 387 (likewise for six years after conviction). A retrospective determination of Silverstein's competence to stand trial would have to be based on three conflicting written reports, a

[15] The Ninth Circuit reached a different conclusion in a case where the third psychiatric report finding the defendant competent to stand trial was based on interviews conducted five months after two psychiatrists had found the defendant incompetent. *United States v. Caplan*, 633 F.2d 534, 539-42 (9th Cir. 1980). The defendant's status had apparently improved under interim psychiatric treatment. Because there was no other specific evidence of the defendant's alleged incompetence, the court of appeals held that it had not been an abuse of discretion not to conduct a competency hearing upon receipt of the third report.

cold, sparse record, and the recollection of those who saw and dealt with him six years ago. Such a hearing would be a wholly inadequate substitute for the "concurrent hearing" into competency mandated by *Pate*. *Pate, supra,* at 387; *see Drope v. Missouri, supra; Dusky v. United States,* 362 U.S. 402, 403 (1960).[18] Accordingly, we reverse and direct the issuance of the writ of habeas corpus unless the state brings Silverstein to trial within a reasonable time.[19]

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18 *Cf. McCarthy v. United States,* 394 U.S. 459, 470 (1969) (because of doubts about the voluntariness of defendant's guilty plea, the court set aside the conviction rather than order a hearing into voluntariness, holding that "[t]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (emphasis in original)).

19 We have not been in any way concerned with whether Silverstein may have been legally responsible for the crimes with which he has been charged. Consequently, nothing we have said is to be construed as an expression of opinion on that issue.

SUPREME COURT OF THE STATE OF NEW YORK

TRIAL TERM PART 14 : BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NORMAN SILVERSTEIN,

Defendant.

INDICTMENT NO 994/76

April 12, 1977

B E F O R E: HON. HOWARD GOLDFLUSS,
Justice

A P P E A R A N C E S:

MARIO MEROLA, ESQ.
District Attorney, Bronx County
BY: JOEL LUTWIN, ESQ.
Assistant District Attorney

OTTO FUSCO, ESQ.
Attorney for Defendant
BY: ARTHUR F. X. HENRIKSEN, ESQ.

ALLAN R. SHERMAN
Court Reporter

hsr

Appendix B

THE CLERK: Number 7 and 20. Norman Silverstein.

MR. HENRIKSEN: Otto Fusco by Arthur F. Henriksen for Norman Silverstein.

MR. LUTWIN: Number 7 has been presented to the Grand Jury on April 11, your Honor. I don't know what the status is now, so, could we have --

MR. HENRIKSEN: I'm not sure whether that defendant wuld not want to appear before the Grand Jury.

THE COURT: For the record, the report back from --

MR. HENRIKSEN: Your Honor, could we wait?

(Whereupon there was a brief pause.)

MR. HENRIKSEN: If your Honor pleases, on the 22nd of March, on your order, a psychiatric examination was conducted by Dillont and Angeles, a report has been rendered dated April 7th and April 6th respectively, where both concluded, medically and psychiatrically that the defendant is incompetent and unfit to proceed. I accordingly move to confirm their respective reports.

MR. LUTWIN: Number 3 is a N.C.B. case. They

should have an opportunity, I doubt very strongly whether they could oppose the findings of the psychiatrist. Neither will I at this time.

THE COURT: For the record, this report has been received by the Court pursuant to 730 of the C.P.L., Article 730, and the finding by two psychiatrists is that the defendant, that his judgment and intelligence are sufficiently impaired to the extent that he cannot assist in his own defense and he is unfit to proceed. Under those circumstances, the motion to confirm the report is granted and the defendant, Norman Silverstein, having been examined pursuant to Court Order by two psychiatric examiners, the Court having examined such examination report, a copy of which will be attached to this order, it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him or to assist in his defense.

I therefore order that the defendant is to be continued in detention and referred to--he will be in Beelevue Hospital until such time as Department of Mental Hygiene sends him to the appropriate institution. All right. So ordered.

THE CLERK: What about the other indictment, Judge?

THE COURT: Well, at this point, since there is no indictment --

THE CLERK: There is no indictment.

THE COURT: The District Attorney is advised of the determination by the psychiatrist and whether the District Attorney wishes to proceed and get an indictment is up to them. At this point, however, we'll mark the case off.

We'll give it a control date of April 22nd for the other case.

This is to certify that the foregoing is a true and accurate transcription of the original stenographic record of Allan R. Sherman, Court Reporter, to the best of my ability.

HERBERT S. REING, C.S.R.
Principal Court Reporter

MOTION FILED
AUG 26 1983

ORIGINAL

No. 82-2156

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

ROBERT HENDERSON,

Petitioner,

-v.-

NORMAN SILVERSTEIN,

Respondent.

SUPREME COURT, U.S.
SUPREME COURT, U.S.
SUPREME COURT, U.S.

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APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Respondent Norman Silverstein respectfully seeks leave to proceed here in forma pauperis, without payment of filing fees and costs.

Counsel certifies that, in proceedings before the lower court in this case, petitioner was represented by counsel assigned pursuant to the Criminal Justice Act.

New York, New York

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New York, New York, 10004
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Attorney for Respondent

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